

WHO CAN TURN A BLIND EYE TO CYBER HATE?

Council of Europe's Evolving Practices and New Challenges

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<p>Liability of online operators for user-generated content is a topical issue in Europe. The case of <i>Delfi AS v. Estonia</i>, which is currently pending before the Grand Chamber of the European Court of Human Rights, is one example of a situation where questions related to this issue are analysed. The First Section judgment finding the online news portal operator, Delfi, liable for defamatory user-generated comments was widely criticised. Moreover, other topical issue in Europe regards dissemination of cyber hate. This thesis combines these two elements and seeks to answer the following question: Which online entities, if any of them, are liable for the dissemination of user-generated cyber hate? The analysis is limited to the approach of the Council of Europe, although the rules and principles adopted in the United States are referred to due to their trendsetter status.</p> <p>Freedom of expression is protected by Article 10 of the European Human Rights Convention. According to the rules and principles adopted in the framework of the Council, this Article does not protect 'hate speech' or its online version 'cyber hate'. However, there exists no clear definition of 'hate speech'. In the strategies adopted by different Council bodies and in the case-law of the Court, several categories of speech have been considered as 'hate speech'. However, this practice has been neither clear nor consistent. This is especially regrettable noting that, according to the Court's case-law, 'hate speech' can be categorically excluded from the protection of Article 10 by using the probation of the abuse of rights clause provided for in Article 17 of the Convention. In the course of this research, I come to oppose said the application of said Article due to the unnecessary risks it poses on the enjoyment of freedom of expression. Moreover, I strongly endorse the adoption of a legally binding definition of the central notion.</p> <p>Concerning liability issues, in the case-law of the Court, the media has been afforded special protection under Article 10. On the other hand, this protection is coupled with responsibilities. Therefore, professional journalists have been held liable even for dissemination of third-party content. The central elements analysed by the Court when imposing such liability in printed media cases have been the amount of editorial control and the intent of the journalist. Due to their functions, some online operators have been assimilated to these traditional media actors. They are considered content providers. However, so-called Internet service providers are a category of online operators regarded as intermediary or auxiliary entities. These entities enjoy a limited liability regime. Again, the key in making this distinction between content providers and ISPs is the amount of editorial control over the content the respective entity hosts, transmits or allows to access. Extensive control over information is coupled with wider liability.</p> <p>In the case of <i>Delfi</i>, the First Section of the Court concluded that due to the amount of control practiced by Delfi, it was to be regarded as a content provider. I agree with the main parts of the Court's analysis. Furthermore, the liability related principles adopted by the Court in this case can be applied in relation to 'cyber hate' cases, although the criminal nature of these cases allows the primary liability to be imposed also on the actual authors of the content. I consider that in order for the Council's fight against 'hate speech' to be effective, additional liability should be imposed on content providers and, in specific circumstances, even on ISPs. I endorse the mobilization of and co-operation with the relevant private sector actors to form guidelines on self-regulatory measures they could apply in order to comply with their duties. Accordingly, the suggested answer to the question posed in the beginning of this research is that all online operators can be liable for user-generated 'cyber hate' in case they neglect their respective responsibilities. In the future, the aim of the Council should be to try to hinder any attempts by these entities to rely on the so-called wilful blindness. However, any liabilities imposed must be assessed on case-by-cases basis, taking the circumstances of the specific cases into account, and respecting the inherent principles of Article 10 of the Convention.</p>			
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It once seemed easier to ignore the haters among us. They held furtive meetings in out-of-the-way places, wrote racist screeds in the guise of bad novels, and when they appeared in public, they wore hoods to hide their faces. Now, they apply for admission to the bar, stand for elected office, appear on radio and television talk shows, and increasingly take their message to the mainstream by using the Internet.

Paul McMasters, 1999¹

¹ McMasters, Paul, 'Must a Civil Society Be a Censored Society?', 26 *Human Rights* (1999), 8–10, at 8.

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List of abbreviations

ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ECRI	European Commission against Racism and Intolerance
EU	European Union
FCNM	Framework Convention for the Protection of National Minorities
GC	Grand Chamber of the European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICT	Information and Communication Technologies
ISP	Internet Service Provider
UN	United Nations
US	United States of America

INTRODUCTION: WHO IS LIABLE FOR CYBER HATE?

1 Starting Point

Research question

In recent years, newspapers at both a local and international level have informed us of the new popularity gained by extremist thoughts around the globe.² To some extent this victorious march has been enabled by the mainstream use of new information and communication technologies (ICTs), the flagship of which is the Internet. By making ideologies easily spreadable and available to wider audiences than ever before, the Internet has undoubtedly brought with it great benefits, and not least to the enforcement of freedom of speech. However, these benefits come with a downside, as some groups have begun to use the Internet as a platform to undermine others.

I first started to consider the legal side of this issue in the autumn of 2013, when I participated in the European Human Rights Moot Court Competition organized by the European Law Students' Association in cooperation with the Council of Europe (hereinafter 'the Council').³ The hypothetical case we had to plead in the competition was based on the law of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter 'European Convention on Human Rights', 'ECHR' or 'the Convention'), and concentrated on online 'hate speech'.⁴ It was inspired by an actual defamation case currently pending

² YLE, 'Viharyhmät yleistyneet Facebookissa ja YouTubessa', *YLE Uutiset*, 14 May 2009, available at <http://yle.fi/uutiset/viharyhmat_yleistyneet_facebookissa_ja_youtubessa/5251618>, 4 January 2015; Severson, Kim, 'Number of U.S. Hate Groups Is Rising, Report Says', *The New York Times*, 7 March 2012, available at <http://www.nytimes.com/2012/03/08/us/number-of-us-hate-groups-on-the-rise-report-says.html?_r=0>, 4 January 2015; and Gude, Hubert; Popp, Maximilian; and Schindler, Jörg, 'Right-Wing Extremism: Germany's New Islamophobia Boom'; translation by Rogers, Thomas; *Spiegel Online International*, 5 March 2014, available at <<http://www.spiegel.de/international/germany/islamophobic-hate-groups-become-more-prominent-in-germany-a-956801.html>>, 4 January 2015.

³ The Council of Europe was established after the Second World War, on 5 May 1949. It started as a post-war attempt to unify Europe against new forms of totalitarianism. The Council currently consists of 47 Member States. See Harris, David; O'Boyle, Michael; and Warbrick, Colin, *Law of the European Convention on Human Rights* (Butterworths, Chatham, 1995), at 1; and Ovey, Clare and White, Robin, *Jacobs, White and Ovey: The European Convention on Human Rights* (5th Edition, Oxford University Press, 2010), at 5–7.

⁴ Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, *European Treaty Series* No. 5, as amended by Protocol No. 14 (amending the control system of the Convention, Strasbourg, 13 May 2004, in force 1 June 2010, *European Treaty Series* No. 194) as from the date of its entry into force on 1 June 2010. All new members of the Council are required to accede this Convention. It reflects the aims and concerns that led to the establishment of the Council. It guarantees mainly civil and political rights, with the exemptions of Protocol No.1 Articles 1 (right

before the Grand Chamber of the European Court of Human Rights (hereinafter ‘the Court’ or ‘ECtHR’): *Delfi AS v. Estonia*.⁵ The central issue analysed by the Court in this case is whether the imposing of civil liability for defamatory user-generated content is a disproportionate interference with a news portal operator’s (*Delfi*) freedom of expression. This case demonstrates that questions regarding online liability are current in Europe today. Moreover, the recent news from home and abroad have shown that the issues regarding online ‘hate speech’ or ‘cyber hate’ should be taken seriously. The question is not of offending words but of content with the potential to incite actual violence.⁶ Accordingly, my aim in this research is to combine these two elements and try to find an answer to the following question: Who is liable for ‘cyber hate’?

Freedom of expression and hate speech

‘Hate speech’ is a form of speech. Freedom of speech or expression, on the other hand, is recognized as a ‘human right’ and protected in all universal and regional human rights instruments.⁷ By definition, ‘human rights’ are universal and inalienable rights belonging to every human in virtue of their humanity. ‘Human rights’ are distinct from general ‘rights’, because they are ‘not acquired, nor can they be transferred, disposed of or extinguished by any act or event’.⁸ However, all rights come with exceptions. These exceptions are essential

to property) and 2 (right to education). For more detailed analysis see, for example, Ovey & White, *The European Convention*, 5th Edition, *supra* note 3.

⁵ *Delfi AS v. Estonia*, Application no. 64569/09, 10 October 2013 (Referral to the Grand Chamber 17 February 2014). The permanent European Court of Human Rights was established by Protocol No. 11 to the Convention on 1 November 1998. It consists of a number of judges equal to the number of the Council’s Member States, and its principal role is to pronounce on applications brought by the Member States and individuals under the Convention. Its judgments are legally binding on the respondent States. For more detailed analysis see, for example, Ovey & White, *The European Convention*, 5th Edition, *supra* note 3, especially at 20–52.

⁶ One example are the actions of a Norwegian right-wing extremist Anders Behring Breivik in July 2011. He killed 77 people by planting a bomb in Oslo centre and by shooting participants of a summer camp organized by the youth wing of Norway’s Labour party. According to his own words, his motivation was to wake people up to see the ‘systematic deconstruction of the Norwegian and European culture’ from multiculturalism. See Pidd, Helen, ‘Anders Behring Breivik describes Utøya massacre to Oslo court’, *the Guardian*, 20 April 2012, available at <<http://www.theguardian.com/world/2012/apr/20/anders-behring-breivik-massacre-court>>, 4 January 2015. Recently, ‘hate speech’ has been discussed in the press due to the attacks on the French satirical newspaper *Charlie Hebdo* and a seminar discussing art and blasphemy in Copenhagen. See on this discussion for example the opinion of Ginsberg, Jodie, ‘The right to free speech means nothing without the right to offend’, *the Guardian*, 16 February 2015, available at <<http://www.theguardian.com/commentisfree/2015/feb/16/free-speech-means-nothing-without-right-to-offend-paris-copenhagen>>, 20 February 2015.

⁷ See, inter alia, Article 10 ECHR; United Nations, International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 *United Nations Treaty Series* 171, Article 19; Organization of American States, American Convention on Human Rights, ‘PACT OF SAN JOSE, COSTA RICA’, San Jose, 22 November 1969, in force 18 July 1978, *Organization of American States Treaty Series* No. 36, Article 13; and Organization of African Unity, African Charter on Human and People’s Rights, 27 June 1981, in force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 9.

⁸ In this context, it should be noted that although there is no hierarchy of ‘human rights’, some of them are regarded as ‘absolute’ meaning that they allow no derogations. Examples of such rights include, inter alia, prohibition of torture and prohibition of slavery. Moreover, some rights that are not ‘absolute’ in the

for the rights to endure ‘the uncertainties of the future’.⁹ Therefore, even ‘human rights’ have boundaries. Firstly, most of these rights are subject to ‘restrictions and limitations to accommodate the rights of others’.¹⁰ Secondly, some of them can be derogated during the time of war or emergency.¹¹ Finally, some rights can be restricted in very specific circumstances or in order to secure certain interests.¹² It is important to highlight, however, that the principle of the ‘rule of law’ requires that all restrictions and limitations to these rights must be clear, affirmative, and applied in ‘good faith’.¹³ Thus, these restrictions and limitations are often expressly authorized by the same instruments where the relevant ‘human rights’ are guaranteed.

Accordingly, freedom of expression has its limitations and, therefore, even if ‘hate speech’ was protected as a part of this right, this protection would not be absolute. However, it is not clear whether ‘hate speech’ is a protected form of expression. At least in some instances it has been left outside of any protection. The most central provision in this regard is Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted in 1965 by the United Nations (UN).¹⁴ In this provision, the State Parties to ICERD express their condemnation of ‘all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form’. Moreover, the provision requires State Parties, inter alia, to declare as an offence punishable by law ‘all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts

aforementioned sense are referred to as ‘core’ or ‘fundamental’ rights meaning that their protection is a precondition for the protection of other rights. Such are, inter alia, right to life and right to liberty. See Ovey & White, *The European Convention*, 5th Edition, *supra* note 3, at 9; and Sieghart, Paul, *The International Law of Human Rights* (Oxford University Press, 1983), at 17 and 19.

⁹ Petman, Jarna, *Human Rights and Violence: the hope and the fear of the liberal world* (University of Helsinki, 2012), at 182–183. Petman uses the example of freedom of association. The drafters of this right, or any right for that matter, could not predict all cases it should cover in the future. See also Koskeniemi, Martti, ‘The Effect of Rights on Political Culture’ in Philip Alston (ed.), *The EU and Human Rights* (Oxford University Press, 1999) 99–116, at 110–111.

¹⁰ Sieghart, *Human Rights*, *supra* note 8, at 87. Other rights protected as ‘human rights’ and relevant in the context of this analysis include, inter alia, right to private life, freedom of religion, and the right not to be discriminated. See, inter alia, Articles 8, 9 and 14 ECHR.

¹¹ See for derogations Article 15 ECHR.

¹² See for special circumstances Article 2(2) ECHR, and for certain interests Articles 8–11 ECHR.

¹³ This is one of the basic principles of international law. See United Nations, Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 *United Nations Treaty Series* 331, Article 31(1). See also Ovey & White, *The European Convention*, 5th Edition, *supra* note 3, at 127 and 308–312; and Sieghart, *Human Rights*, *supra* note 8, at 19.

¹⁴ United Nations, International Convention on the Elimination of All Forms of Racial Discrimination, New York, 7 March 1966, in force 4 January 1969, 660 *United Nations Treaty Series* 195.

against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof'. However, although there are 87 Signatories to ICERD, many of them, and perhaps most notably the United States of America (hereinafter 'US' or 'the United States'), have made reservations to the applicability of Article 4.¹⁵ Paradoxically, this is mainly due to the heavy restrictions imposed by said provision on freedom of speech. Accordingly, there seems to be no universally accepted stand regarding 'hate speech'.

Liability for wrongful conduct

As mentioned above, I am particularly interested in questions concerning liability. Another distinction between general rights and 'human rights' is that 'human rights' impose duties only on States and public authorities, and not on other individuals.¹⁶ However, the States' obligations following from the 'human rights' instruments usually include a positive obligation to try to hinder infringements of rights of individuals by other individuals.¹⁷ Thus, in its domestic legislation, a Member State might need to criminalize acts or impose liabilities also on private entities in order to effectively fulfil this obligation. This is called the 'indirect' or 'horizontal' effect of 'human rights'.¹⁸ My aim is to discover to whom, if anyone, the authorities could (or should) impose liabilities with regard to the dissemination of 'hate speech'. In this research, I will focus on the more complex and current issues regarding the liability for content created by a third party. I am particularly interested in the

¹⁵ United Nations, Treaty collection, ICERD, available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV2&chapter=4&lang=en>, 3 January 2015.

¹⁶ Sieghart, *Human Rights*, *supra* note 8, at 17.

¹⁷ Ovey & White, *The European Convention*, 5th Edition, *supra* note 3, at 99–102. See, for example, Article 1 ECHR. The Court has found a violation when a Member State has failed to take actions in order to guarantee to those within its jurisdiction protection of their Convention rights. The Court has stated the following about the positive obligations: 'In determining the scope of a State's positive obligations, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual, the diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. Nor must these obligations be interpreted in such a way as to impose an impossible or disproportionate burden.' See the case of *Ilaşcu and Others v. Moldova and Russia*, Application no. 48787/99, [GC] 8 July 2004.

¹⁸ Hirvelä, Päivi and Heikkilä, Satu, *Ihmisoikeudet – käsikirja EIT:n oikeuskäytäntöön* (Edita, Porvoo, 2013), at 598. In this connection, it is necessary to briefly discuss the applicability of '*drittwirkung*'. It is a German term and refers to the liability of individuals. It is generally recognized that the Convention does not entail a degree of '*drittwirkung*'. It only imposes obligations on Member States. Thus, the Convention touches the conduct of private persons only indirectly when action is taken by the respective State in order to secure the protection of Convention rights, for example, by prohibiting certain actions by individuals. See Harris, David; O'Boyle, Michael; and Warbrick, Colin, *Law of the European Convention on Human Rights* (2nd Edition, Oxford University Press, 2009), at 18–21; Ovey & White, *The European Convention*, 5th Edition, *supra* note 3, at 99–102; and Sieghart, *Human Rights*, *supra* note 8, at 34–44. For more detailed analysis on human rights in private sphere see Clapham, Andrew, *Human Rights in the Private Sphere* (Oxford University Press, 1993) especially at 189–149 and 178–244, and on '*drittwirkung*' at 188–206.

liability of online operators for user-generated content. Due to the circumstances inherent to the case of *Delfi*, I will concentrate especially on the liability of an online news portal operator allowing user comments.

Outlining my research

Accordingly, two separate but overlapping components form the basis of my legal analysis: (i) position on ‘cyber hate’; and (ii) position on online liability. I will focus my research on the approach of the Council. This is due to two main reasons. Firstly, to date human rights have been ‘most fully and systematically developed’ under the law of the ECHR.¹⁹ Secondly, after ICERD failed to achieve a universal stand on ‘hate speech’, the European countries began to take action to form at least a European consensus on the issue, and the task of drafting a uniform European law was given to the Council of Europe.²⁰ However, it should be noted that discourse concerning this topic was first started in the United States. Hence, after introducing some central actors of online environment and the case that inspired me to start this research (*Delfi*), I will briefly analyse the relevant US legal discourse and praxis. The findings of this analysis will then be compared to the European approaches in the course of this research.²¹ After this Introduction Chapter, my research is divided into two Parts. In Part I, I will turn my attention to the Council of Europe and the principles established by it regarding liability for ‘hate speech’. I will begin by defining and outlining the scope of two key concepts: freedom of expression and ‘hate speech’. I will then analyse the different strategies adopted by the Council discussing both treaty-based and standard-setting texts but concentrating especially on the case-law of the Court, where these strategies are interpreted and enforced. The aim of Part I is to reveal the relevant rules and principles established before the emergence of cyberspace. Part II of this research, in turn, focuses on the Internet. I will begin by assessing the more recent strategies adopted by the Council, but my focus will again be on the case-law of the Court. After analysing some seminal Internet-related cases, I will turn my attention to the Court’s judgment in the case of *Delfi*.²² Although *Delfi* is a defamation case, it is highly relevant for my analysis because it deals with online liability issues. Accordingly, I will analyse the different arguments presented regarding this case and then propose my own hypothesis of its outcome in light of the findings of this research.

¹⁹ See Ovey, Clare and White, Robin, *Jacobs and White, The European Convention on Human Rights* (4th edition, Oxford University Press, 2006), at 3.

²⁰ Van Blarcum, Christopher, “‘Internet Hate Speech’: The European Framework and the Emerging American Haven”, 62 *Washington and Lee Law Review* (2005), 781–830, at 787.

²¹ *Delfi AS v. Estonia*, *supra* note 5.

²² *Ibid.*

Finally, under Concluding Remarks, I will discuss the applicability of the *Delfi* judgement to ‘cyber hate’ cases and present my own remarks and suggestions with this regard. Hopefully, I will be able to conclude by answering the question posed in the title of this Introduction Chapter. Let the journey begin.

2 Background for Analysis

2.1 Introducing Internet

2.1.1 *Explosion and exploitation*

In most western countries the legal doctrine regarding traditional or classical media was firmly set in the early 90's. However, what was not foreseen was the explosion of the Internet. It got into mainstream use and started growing at unparalleled speed in the beginning of the 90's starting from the United States.²³ This has been referred to as 'the most important development in communications technology since the printing revolution'.²⁴ Where it took radio broadcasters 38 years to reach an audience of 50 million people, the television made it in 13 years, but for the Internet it only took four years.²⁵ One component in particular enabled this march – namely the World Wide Web.²⁶ After the Internet had catapulted itself into mainstream use, its central role in the exchange of ideas by many became evident. However, simultaneously, it became apparent that the abuse of the same would grow an increasingly serious problem.²⁷ Traditional views on freedom of expression had not foreseen this kind of a challenge. Hence, a slow adaption process begun and, to some extent, still continues today.

The central characteristics of the Internet as a medium of communication are (i) the low cost of creating and consulting content, (ii) the instant nature of content dissemination, (iii) the lack of any 'editorial control', (iv) the interactivity of the medium, and (v) the durability of the published information.²⁸ With these features, the Internet empowers free speech. However, the 'anonymity, immediacy and global nature of the Internet' also make it the

²³ Greenberg, Sally, 'Threats, Harassment and Hate On-Line: Recent Developments', 6 *Boston University Public Interest Law Journal* (1997), 673–701, at 673.

²⁴ Barendt, Eric, *Freedom of Speech* (2nd edition, Oxford University Press, 2005), at 451.

²⁵ United Nations, 'United Nations Cyberschoolbus: Information and Communications technology' <<http://www.un.org/cyberschoolbus/>>, 20 October 2014.

²⁶ The World Wide Web was invented in 1989 by Tim Berners-Lee, a scientist working at CERN, Switzerland. It is a software required, along with a basic browser and a library of code, to run a web server. It was put in public domain in 1993. See on this O'Luanaigh, Gian, 'World Wide Web born at CERN 25 years ago', 8 April 2014, available at <<http://home.web.cern.ch/about/updates/2014/03/world-wide-web-born-cern-25-years-ago>>, 4 January 2015. See also Greenberg, 'Threats, Harassment and Hate On-Line: Recent Developments', *supra* note 23, at 685; and Hoffman, David, *Web of Hate: Extremists Exploit the Internet*, (Anti-Defamation League of B'nai B'rith, New York, 1996), at 3.

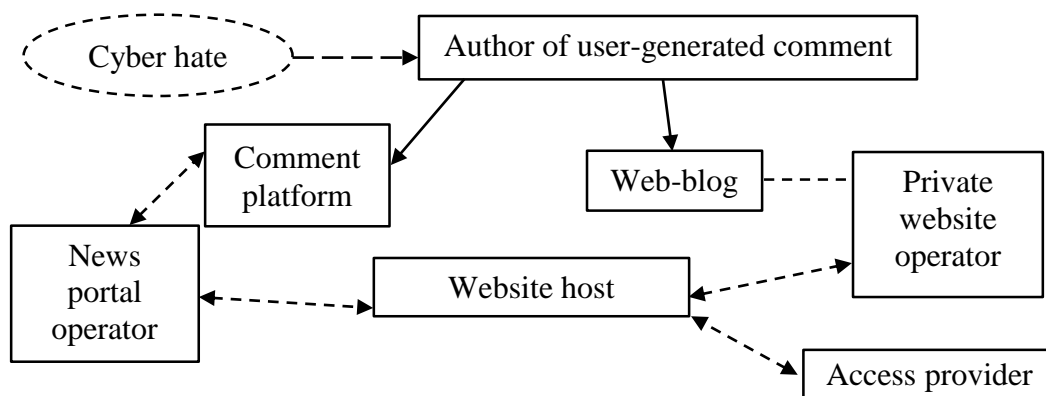
²⁷ Gilbert, Jonathan, 'Computer Bulletin Board Operator Liability for User Misuse', 54 *Fordham Law Review*, (1985–1986), 439–454, at 441.

²⁸ Vajić, Nina and Voyatziz, Panayotis 'The Internet and Freedom of Expression: a "Brave New World" and the ECtHR's Evolving Case-law' in Casadevall, Josep; Myjer, Egbert; O'Boyle, Michael; and Austin, Anna (eds.), *Freedom of Expression: Essays in honour of Nicholas Bratza* (Wolf Legal Publishers, Oisterwijk, 2012), 391–407, at 392–393.

perfect tool for promotion of extremist thoughts.²⁹ One group of people exploiting this possibility are hate-mongers, who achieved real success in the United States after being able to recruit new members and spread their views online. The Internet made it possible for them to reach larger audiences with considerable ease, effectively creating a whole new market for their propaganda.³⁰ Today, anyone owning a computer can set up their own website or a blog or simply start communicating via social media.³¹ This has also affected the traditional media professionals. They are now sharing their field with (and to some extent competing against) the so-called ‘new media entities’ many of whom operate by their own rules. This has obvious benefits regarding democratization of society and public discourse, but the by-product, the so-called ‘low level digital speech’, brings with it great challenges including questions concerning liability.³²

2.1.2 Online operators

I created the following diagram to demonstrate the central actors of the online environment and their online relationships:



In this diagram, ‘cyber hate’, or more precisely the liability for it, is the element moving from entity to entity. The relevant act is making ‘cyber hate’ available to the public online,

²⁹ Banks, James, ‘European Regulation of Cross-Border Hate Speech in Cyberspace: the Limits of Legislation’, 19 *European Journal of Crime, Criminal Law and Criminal Justice* (2011), 1–13, at 3.

³⁰ Greenberg, ‘Threats, Harassment and Hate On-Line: Recent Developments’, *supra* note 23, at 686–687; and Hoffmann, *Web of Hate*, *supra* note 26, at 22. See also Siegel, Michael, ‘Hate Speech, Civil Rights, and the Internet: The Jurisdictional and Human Rights Nightmare’, 9 *Albany Law Journal of Science & Technology* 2 (1999), 375–398, at 381; and Weintraub-Reiter, Rachel, ‘Hate Speech over the Internet: a Traditional Constitutional Analysis or a New Cyber Constitution?’, 8 *Boston University Public Interest Law Journal* (1998–1999), 145–173, at 146.

³¹ McGonagle, Tarlach, ‘The Council of Europe against online hate speech: Conundrums and challenges’, Expert paper for Council of Europe Conference of Ministers responsible for Media and Information Society, Belgrade, 7–8 November 2013, MCM(2013)005, at 26.

³² McGonagle, ‘The Council of Europe against Online Hate Speech’, *supra* note 31, at 26.

and the key question is the following: Which entity, if any, is liable for it? The diagram illustrates a hypothetical situation where a user-generated ‘cyber hate’ comment – a comment made by a non-professional Internet user and not, for example, by a journalist in his or her professional capacity – has been posted. Today, this kind of comment could appear, inter alia, on a comment platform operated by a professional news portal or on a web-blog. If it is decided that comments of this nature are not permitted, and someone must be held responsible for them, the most obvious answer is to impose liability on their originators. However, if the aim is to uproot all ‘hate speech’, this measure mainly opting at compensating for damage already caused might not be a sufficiently effective.

What about the entity that offered the means to post the hateful comment? Should responsibility lie with the operator of the news portal or the private website? If the latter entities themselves had published wrongful material, for example in the form of a news article or a blog post, they could be regarded as ‘content providers’ and thus responsible for the content they produce.³³ However, when the entity behind the wrongful comment is an anonymous third party, and the website operator is just a ‘host’ to this content, deciding on liability is more difficult. Where to draw a line? Should the website operator have reacted to the wrongful content in order to avoid liability? Other option could be to impose a form of ‘strict liability’ meaning that the operator would be held liable regardless of its actions because it enabled the comment to be made in the first place.³⁴ Then, why restrict the liability only on the website operator? Following the principle of ‘strict liability’, the entity allowing access to the website could also be held liable.

In this context, an important term to define is ‘Internet service providers’ (ISPs). It is a category of online operators. There exists no clear definition of ISPs, but their common nominator is that they are ‘intermediaries’ that ‘disseminate or facilitate access to media or media-like content’.³⁵ According to Article 1 of the Council of Europe’s Convention on Cybercrime (hereinafter ‘the Cybercrime Convention’), ‘service provider’ is, (i) ‘any public or private entity that provides to users of its service the ability to communicate by means of a computer system’; and (ii) ‘any other entity that processes or stores computer data on

³³ However, sometimes even in these situations it might be difficult to identify the author. It is quite common to encounter blogs and private websites hosted by anonymous operators.

³⁴ See in this context the case of *K.U. v Finland*, Application no. 2872/02, 2 December 2008.

³⁵ Jakubowicz, Karol, ‘A new notion of media?’, Background text for Action Plan of the 1st Council of Europe Conference of Ministers Responsible for Media and New Communication Services, Reykjavik, 28–29 May 2009, MCM(2009)011.

behalf of such communication service or users of such service'.³⁶ In practice ISPs, therefore, carry out very different tasks on online environment. Their actions may entail, inter alia, 'providing access to communication networks, transmitting data and hosting information'.³⁷ In my hypothetical example, there are several entities that could be considered as ISPs. First, the 'news portal operator' could be regarded as an ISP with regard to the comment platform it hosts and as such it could be called a 'host provider'. The same might apply to the 'private website operator' allowing user-generated content. On the other hand, as mentioned above, these two might also be regarded as 'content providers'. Then, central questions entail the following: Is a 'content provider' also an ISP? How to differentiate a 'host provider' from a 'content provider'? Is this distinction relevant from the liability point of view? Finally, there are the entity offering a service for website hosting and the entity enabling access to the website. What about these entities: are they ISPs, and what are their liabilities? These are all questions analysed in connection to the case of *Delfi*.³⁸

2.1.3 *Introducing Delfi AS v. Estonia*

The case of *Delfi* concerns one of the largest Internet news portals in Estonia, which publishes up to 330 news articles a day.³⁹ In January 2006, an article was published on *Delfi* featuring the controversial decision of a ferry company to change its routes, and thus to destroy winter ice roads between the mainland and various islands. The article attracted 185 comments in the comment platform attached to the portal. About twenty of these comments contained personal threats and offensive language directed against the majority shareholder of the ferry company. Six weeks later the defamed person requested *Delfi* to remove the offensive comments and claimed damages. The comments were removed on the same day, but the claim for damages was refused.⁴⁰ The shareholder brought civil proceedings against *Delfi*, but his initial claim was dismissed. The County Court found that *Delfi*'s responsibility was excluded under the domestic law based on the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (hereinafter 'EU E-

³⁶ Council of Europe, Convention on Cybercrime, Budapest, 23 November 2001, in force 1 July 2004, *European Treaty Series* No. 185.

³⁷ See the Declaration on freedom of communication on the Internet, adopted on 28 May 2003 at the 840th meeting of the Ministers' Deputies, and its Explanatory Report regarding Principle 6.

³⁸ *Delfi AS v. Estonia*, *supra* note 5.

³⁹ *Ibid.*, § 7.

⁴⁰ *Ibid.*, §§ 12–23.

Commerce Directive’).⁴¹ It concluded, first of all, that the comment platform was to be distinguished from the portal’s journalistic area. Moreover, *Delfi*’s administration of the comments was essentially of a mechanical and passive nature and thus it could not be considered the publisher of the comments. It was a ‘host provider’ with no liability for the user-generated comments and no obligation to monitor them. The Court of Appeal, however, considered that the County Court had erred. The defamed party eventually obtained a final judgment against *Delfi* in June 2009 and was awarded approximately 320 euros in non-pecuniary damages.⁴²

The central element leading to the domestic judgment was the establishment of *Delfi* as a ‘content provider’ with the same responsibilities as a traditional printed media publisher. The domestic courts viewed that an ‘information society service provider’, in the meaning of domestic law and the EU E-Commerce Directive, has neither knowledge of nor control over the information which is transmitted or stored in its services.⁴³ In contrast, a ‘provider of content services’ or a ‘content provider’ governs the content of information that it stores. Thus, at least the Estonian courts are of the opinion that, unlike a ‘host provider’, a ‘content provider’ is not an ISP. This gives a crucial role to the criteria used in order to differentiate these entities. With regard to *Delfi*, the domestic courts emphasized that it had practiced ‘editorial control’ over the comments. It had, for example, enacted ‘house rules’ and removed any comments breaching those rules. On the contrary, the authors could not amend or delete their comments after they had been posted. Thus, *Delfi* had the sole power to decide which comments were published. This power, analogous to the classical form of ‘editorial control’, imposed liability for the published content on *Delfi*.⁴⁴ In December 2009, *Delfi* complained to the ECtHR claiming an infringement of its right to freedom of expression as provided for in Article 10 ECHR.⁴⁵ In Part II, I will analyse the judgment of the Court.⁴⁶

⁴¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, 17 July 2000, *Official Journal of the European Union* L 178.

⁴² *Delfi AS v. Estonia*, *supra* note 5, §§ 17–26.

⁴³ EU E-Commerce Directive, *supra* note 41.

⁴⁴ *Delfi AS v. Estonia*, *supra* note 5, § 27.

⁴⁵ *Ibid*, §§ 1 and 46.

⁴⁶ See in Part II, Section 3.3.2.2 *Delfi AS v. Estonia*.

2.2 Early Discourse in United States

Before starting my analysis of the Council of Europe, I will briefly assess the rules and principles adopted in the United States regarding the position on allowing ‘hate speech’ and the questions regarding online liability.

2.2.1 Approach to hate speech

The stand on traditional forms of ‘hate speech’ had been established in the United States decades before the surfacing of online ‘hate sites’. First Amendment of the Constitution of the United States of America (hereinafter ‘the First Amendment’ or ‘the First Amendment of the US Constitution’) provides strong protection for freedom of speech.⁴⁷ In principle, there are only two situations where ‘hate speech’ could fall outside the scope of this protection: (i) if it constitutes ‘fighting words’ or (ii) if it constitutes ‘a true threat’.⁴⁸

The ‘fighting words’ exception was established in the case of *Chaplinsky v. New Hampshire*, where an individual was convicted for using offensive and derogatory names about a police officer.⁴⁹ In its opinion, the Federal Supreme Court (hereinafter ‘the Supreme Court’) states that the First Amendment does not protect ‘fighting words’ meaning words which ‘by their very utterance inflict injury or tend to incite an immediate breach of the peace’.⁵⁰ Later, this doctrine was tested by the case of *R.A.V v. the City of St. Paul* concerning the conviction of a white extremist for burning a cross on a black family’s property.⁵¹ This case raised the following question: Should racist speech be treated as ‘fighting words’? In this case, the Supreme Court unanimously decided that the relevant State ordinance prohibiting the display of a symbol that ‘arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender’ was unconstitutional because it prohibited only a certain type of

⁴⁷ United States of America, Constitution of the United States of America, 17 September 1787, in force 21 June 1788, 1 *Statutes at Large: Organic Law of the United States* 10–20; and United States of America, Constitution of the United States of America, Amendment I, 25 September 1789, in force 15 December 1791, 1 *Statutes at Large: Organic Laws of the United States* 21. The First Amendment stands as follows: ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.’

⁴⁸ Van Blaricum, “Internet Hate Speech”, *supra* note 20, at 809.

⁴⁹ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), 9 March 1942.

⁵⁰ *Ibid.*, at 571–572. The following is stated in the Supreme Court’s opinion: ‘There are certain well-defined and narrowly limited classes of speech, the prevention...and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libellous, and the insulting or “fighting” words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.’

⁵¹ *R.A.V v. the City of St. Paul*, 505 U.S. 377 (1992), 22 June 1992.

speech on the basis of its subject. The ‘fighting words’ exemption could not be used to discriminate against certain types of opinions.⁵² The key requirement for the application of this exemption is the existence of incitement to lawless action.

The ‘true threat’ exception, on the other hand, was established in the classical case of *Brandenburg v. Ohio*, where the Supreme Court adopted a very strict approach against criminal punishments for any speech attacking racial or religious groups.⁵³ In its opinion, the Supreme Court unanimously holds that the defendants, members of the Ku Klux Klan, who had made derogatory statements about blacks and Jews in a televised rally, could not be convicted since it had not been shown that they had incited ‘imminent lawless action’ and no proof existed that such action would occur.⁵⁴ Accordingly, also here the Supreme Court drew a line between ‘advocating violence’ and ‘inciting to violence’, the latter not being protected by the First Amendment.⁵⁵ Legal actions under ‘true threat’ exemption are allowed solely against speech that is intended to incite imminent lawlessness, and is likely to succeed in it.⁵⁶

In the context of my research, the relevant question is whether the aforementioned established principles concerning classical forms of expression also apply to the Internet. The first relevant case in this regard is the case of *Reno v. American Civil Liberties Union (ACLU)*, where the Supreme Court was called to assess the constitutionality of two provisions of the Communications Decency Act (CDA), enacted by the United States Congress in 1996.⁵⁷ The CDA aims to censor online pornography and other material inappropriate for children’s eyes. The provisions analysed by the Supreme Court criminalized the display of ‘indecent’ or ‘patently offensive’ online communications.⁵⁸ The Supreme Court found these provisions to be unconstitutional due to two main reasons: firstly, the terminology used was unconstitutionally vague; and, secondly, by seeking to completely prevent the online publishing of certain type of content, the provisions constituted an unacceptable content-based blanket restriction on speech. In addition, in its

⁵² *Ibid*, at 2–3. See Van Blaricum, “‘Internet Hate Speech’”, *supra* note 20, at 814.

⁵³ *Brandenburg v. Ohio*, 395 U.S. 444 (1969), 9 June 1969.

⁵⁴ Lewis, Anthony, *Freedom for the Thought That We Hate: A Biography of the First Amendment* (Basic Books, New York, 2007), at 159.

⁵⁵ Rosenfeld, Michael, ‘Hate Speech in Constitutional Jurisprudence: A Comparative Analysis in Herz, Michael and Molnar, Peter (eds.), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press, 2012), 242–289, at 253–254.

⁵⁶ Lewis, *Freedom for the Thought That We Hate*, *supra* note 54, at 162.

⁵⁷ *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), 26 June 1997. United States of America, Communications Decency Act of 1996, PUBLIC LAW 104–104, 8 February 1996, 110 STAT. 133.

⁵⁸ *Ibid*, § 230, 47 USC 230.

opinion the Supreme Court notes that as a criminal statute with penalties such as up to two years of imprisonment, the CDA could have a ‘chilling effect’ meaning that it could ‘cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images’.⁵⁹ Accordingly, applying the ‘fundamental premise of constitutional law’ to the Internet, the Supreme Court ruled that ‘the interest of encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship’.⁶⁰ Thus, in *Reno* the Supreme Court extended the First Amendment protection to all Internet communication.⁶¹ Accordingly, after *Reno* and as an extension of *R.A.V.*, the Supreme Court has been able to strike down all attempts to categorically limit ‘cyber hate’. The First Amendment protects all speech equally regardless of where it occurs. However, this means that the same protection exemptions apply online.

Although it might seem difficult to apply the ‘true threat’ exemption online, the existing case-law proves this to be possible. The relevant case in this regard is the case of *Planned Parenthood of Columbia/Willamette, Inc. v. America Coalition of Life Activists (ACLA)*.⁶² This case concerned a situation where ACLA had published a list of doctors providing abortion services and their addresses on its website.⁶³ Three of the doctors on the list were murdered. Following this, the murdered doctors’ names were crossed out in black on ACLA’s website, whereas the names of the doctors who had been injured by attackers were highlighted in grey.⁶⁴ In its ruling, the Circuit Court concludes that the website and the information contained in it constituted a ‘true threat’. The defendants ought to have known that the identified doctors would feel threatened by this sort of a ‘hit list’.⁶⁵ Thus, the First Amendment did not protect this online content.⁶⁶ Accordingly, due to the First Amendment doctrine, ‘cyber hate’ cannot be restricted, however, when such online speech forms ‘fighting words’ or a ‘true threat’ it is not protected by the Constitution.

⁵⁹ *Reno v. ACLU*, *supra* note 57, § 2345. See Weintraub-Reiter, ‘Hate Speech over the Internet’, *supra* note 30, at 158–161.

⁶⁰ *Reno v. ACLU*, *supra* note 57, §§ 2329 and 2351.

⁶¹ Siegel, ‘Hate Speech, Civil Rights, and the Internet’, *supra* note 30, at 388; and Weintraub-Reiter, ‘Hate Speech over the Internet’, *supra* note 30, at 168.

⁶² *Planned Parenthood of Columbia/Willamette, Inc. v. America Coalition of Life Activists* (en banc), 290 F.3d 1058 (9th Cir. 2002), 7 July 2006.

⁶³ *Ibid.*, §§ 1064–1065.

⁶⁴ *Ibid.*, §§ 1063–1064, and 1080.

⁶⁵ *Ibid.*, § 1088.

⁶⁶ *Ibid.*, § 1086. See on this judgment also Van Blarcum, “Internet Hate Speech”, *supra* note 20, at 810–811.

2.2.2 Approach to liability for user misuse

Liability for wrongful content was one of the first Internet-related questions to be discussed among the US legal scholars.⁶⁷ Due to the afore-described approach on ‘hate speech’, the discussion concentrated mainly on liability for libel or copyright infringements. This, however, does not undermine the relevance of said discussion for the present analysis. Mainly following from the problems inherent to identifying the originators of wrongful content, the emphasis of the discussion was on finding a way to prevent misuse of online platforms altogether and, in observed cases of wrongful content, on ensuring adequate compensation for the victims. However, for example Jonathan Gilbert argued that the imposition of some liability on the website operators allowing user-generated content should be considered ‘both as a source of compensation for victims and as a means of deterring misuse’.⁶⁸

2.2.2.1 Traditional media

Traditionally, in the United States’ legal praxis regarding liability issues, the emphasis has been on distinguishing different roles of the entities involved in the publication. According to these established principles, there are three categories of relevant entities. The first category is the ‘primary publishers’, who are held fully liable for the content they publish. This category includes traditional forms of magazines, newspapers, as well as the authors of the respective articles.⁶⁹ Next, there are the ‘secondary publishers’, who are considered to have a form of ‘qualified privilege’ meaning that they are held liable only if they ‘knew or should have known’ of the wrongful character of the information they transmitted. Classic examples of entities belonging to this group include bookstores and news dealers.⁷⁰ Lastly, there is the group of entities that pass information along but are not considered publishers and thus are not held liable for any content.⁷¹ The idea is that ‘one who merely makes available to another equipment or facilities that he may use himself for general communication purposes’ should not be held liable for publication. This rule applies even if

⁶⁷ Becker, Loftus E, Jr. ‘The Liability of Computer Bulletin Board Operators for Defamation Posted by Others’, 22 *Connecticut Law Review* (1989–1990), 203–238; and Gilbert, ‘Computer Bulletin Board Operator Liability’, *supra* note 27, at 439–454.

⁶⁸ Gilbert, ‘Computer Bulletin Board Operator Liability’, *supra* note 27, at 441.

⁶⁹ See Becker, ‘The Liability of Computer Bulletin Board Operators’, *supra* note 67, at 215.

⁷⁰ See among other authorities *Hartmann v. American News Co.*, 171 F.2d 581 (7th Cir. 1949), 4 January 1949; *Church of Scientology v. Minnesota Medical Association*, 264 N.W.2d 152 (Minn. 1978), 17 March 1978. See also Becker, ‘The Liability of Computer Bulletin Board Operators’, *supra* note 67, at 215 and 226.

⁷¹ See Becker, ‘The Liability of Computer Bulletin Board Operators’, *supra* note 67, at 215.

the supplier knows or has reason to know that the equipment will be used to disseminate wrongful content.⁷² A classic example of this group is a telephone company relaying calls.⁷³

2.2.2.2 Bulletin board operators

Liabilities of bulletin board operators

With regard to the Internet, the first US commentators used the so-called Internet ‘bulletin boards’ as an example when discussing issues of liability. ‘Bulletin boards’ were the precursors to the mainstream use of the World Wide Web by ISPs. They were usually small-scale, locally oriented systems that allowed the storage of information submitted by users and the retransmitting of that information to other users. The early commentators considered that the ‘bulletin board’ operators’ potential and often actual control over the information published might justify the drawing of parallels between them and the representatives of the classical press. As mentioned above, traditionally the latter had been held liable for all the material published, even when the actual words had been written by a third party.⁷⁴ Associating ‘bulletin board’ operators with the classical press would thus have implied that they also should have been held liable for infringing content authored by their users. Thus, to follow the terminology used in this research, they would have been regarded as ‘content providers’. However, the US legal commentators argued that this was not the right analogy to follow because it ignored the key element of the US printed media cases.

According to Loftus Becker, the aforementioned key element is that ‘everything that goes into a book, newspaper, or magazine is “known” to some agent of the publisher, who is thus vicariously chargeable with that knowledge’. Accordingly, from these cases it follows that the emphasis should always be on the ‘actual knowledge’ and not on the nature of the entity. A publisher should not be held liable for publishing something regardless of whether he or she was aware of the publication. Thus, imposing liability on the publisher requires that the publisher has had an opportunity to remove the offending material.⁷⁵ Becker argues that this interpretation is expressly established in the case of *Smith v. California*, where the Supreme Court struck down an ordinance imposing ‘strict liability’ for booksellers found in possession of obscene material.⁷⁶ According to Becker, it follows from the continued

⁷² *Ibid*, at 219.

⁷³ *Ibid*, at 215.

⁷⁴ Becker, ‘The Liability of Computer Bulletin Board Operators’, *supra* note 67, at 222.

⁷⁵ *Ibid*, at 222–223.

⁷⁶ *Smith v. California*, 361 U.S. 147 (1959), 14 December 1959. Becker notes that although the Supreme Court had not expanded the application of this ruling since, it had regularly cited it in both obscenity and libel cases.

viability of *Smith* that ‘the old asserted strict-liability rule for publishers of printed material cannot be applied either to them or to computer bulletin board operators consistent with the first amendment’.⁷⁷ Therefore, computer ‘bulletin board’ operators should be treated as ‘secondary publishers’ or, using the terminology adopted in this research, ‘host providers’ and thus liable only if they continued to make the information available after becoming aware of the wrongful material being transmitted.⁷⁸ The form of liability discussed by the US commentators was mainly civil liability. However, the possibility of imposing criminal liability was also noted. For example, Gilbert suggested that such liability should be imposed only when the ‘bulletin board’ operators’ actions demonstrated that they were intentionally furthering or promoting criminal activity by knowingly ignoring its existence.⁷⁹

Duties of bulletin board operators

Regardless of the adaption of an approach restricting the liability of ‘bulletin board’ operators, the early US commentators also suggested methods for tackling issues related to anonymous commenting. One of these methods was the imposition of duties on these same operators. The idea was that by acting in accordance with these duties, the website operators could escape liability for misuse by others. At the same time it was stressed, however, that the operators should not be imposed a burden creating a ‘chilling effect’, which would discourage them from running their services altogether.⁸⁰ This would have undermined the benefits created by the Internet to the exercise of freedom of speech.

One of the suggested measures entailed the use of a mechanism for identifying the individuals posting messages by, for example, requiring the users to create an account before allowing them to generate content. Some commentators, such as Gilbert, went even further by requiring that, in order to avoid liability, the operators should also try to verify the given identity of the commentators. Another measure proposed was the pre-screening of content. This measure, however, was subject to criticism even by those who suggested it. Arguably, even though this measure might offer ‘the most potential deterrent value’, the benefit is gained at too great a cost. The presumed risks entailed the commercial operators raising their costs to meet the additional burden created by the pre-screening and, worse, the non-profit

See among other authorities *Hamling v. United States*, 418 U.S. 87 (1974), 24 June 1974; and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), 26 June 1985.

⁷⁷ Becker, ‘The Liability of Computer Bulletin Board Operators’, *supra* note 67, at 235.

⁷⁸ *Ibid*, at 223, 228 and 235.

⁷⁹ Gilbert, ‘Computer Bulletin Board Operator Liability’, *supra* note 27, at 453–454.

⁸⁰ *Ibid*, at 442.

service operators stopping to offer their facilities altogether. In addition, it was feared that the operators might start to censor completely legitimate messages in order to avoid all liability. This would endanger the very core principals of the US free speech doctrine.⁸¹ The third measure proposed was the application of automatic screening systems. This measure entails the programming of the services to automatically reject any material containing certain terms. However, also this measure was seen to entail a risk of deletion of completely legitimate material simply including words that in other context might form a wrongful message.⁸²

In addition to the aforementioned measures, measures to reduce the damage already caused were also discussed. These included, for example, the application of ‘notice-and-takedown systems’. The idea was that these systems would allow other users to inform the operator of a message allegedly including wrongful content. After receiving this information the operator should then review said content and decide whether it ought to be deleted. Another similar method suggested was the deletion of messages after a specific period of time. In connection to this measure it was noted, however, that its advantages would probably be outweighed by its undesirable implications: the automatic deletion of all content after certain period of time would also destroy a lot of desirable content impairing the Internet’s usability as an information tool.⁸³

This discourse by the US commentators has later acted as a universal source of inspiration and many of the suggested measures are used today by different online operators. However, the debate regarding their benefits and disadvantages carries on. Moreover, different approaches exist as to whether the authorities may oblige ‘bulletin board’ operators – or later ISPs – to apply these measures. I will return to this question in the course of this research.

2.2.2.3 Emergence of case-law

The very first case regarding online liability was the 1991 defamation case *Cubby Inc. v. CompuServe*, where the State District Court decided that the ‘bulletin board’ operator (CompuServe) could not be held liable for user-generated content that it was not aware of.⁸⁴

⁸¹ *Ibid*, at 445–447.

⁸² *Ibid*, at 449.

⁸³ *Ibid*, at 451–452.

⁸⁴ *Cubby Inc. v. CompuServe* 776 F. Supreme Court 135 (S.D.N.Y. 1991), 29 October 1991. A person sued CompuServe after an anonymous user had posted defamatory material about the plaintiff’s business to a discussion forum operated by CompuServe. The District Court ruled in benefit of CompuServe. It should be noted that, unlike the other cases, this case was ruled by US State courts. In the United States there are two

This decision was well-received among the ‘bulletin board’ operators, but their joy did not last for long. The State Supreme Court soon took an opposing view in the case of *Stratton Oakmont v. Prodigy*.⁸⁵ In this case, the applicant had filed a libel action after an anonymous user posted defamatory messages on a ‘bulletin board’ hosted by Prodigy. In its judgment the court specifically states that there is a twofold distinction to be made between CompuServe and Prodigy. Firstly, Prodigy had held itself out to the public as a network that had ‘editorial control’ over the content on its ‘bulletin board’. Secondly, Prodigy had implemented this control through an automatic software screening program, which identified offensive language, and ‘user guidelines’ that the board operators were required to enforce. The court concluded that by this active utilization of technology and man power to delete wrongful messages, Prodigy had in fact gained ‘editorial control’ of the published content.⁸⁶ Accordingly, Prodigy was to be considered a publisher – or a ‘content provider’ – rather than a distributor.⁸⁷ This ruling was met with fear of ‘chilling effect’. Legal commentators were afraid that due to this ruling the ‘bulletin board’ operators would rather not allow publication of any controversial material than to risk of being held liable for it.⁸⁸

Even the legislator reacted to the judgment in *Prodigy*. It inspired the United States’ Congress to enact the aforementioned Communications Decency Act.⁸⁹ Provision of interest in this context is Section 230 CDA, which states that ‘no provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider...’⁹⁰ The impact of this Section was first witnessed in the case of *Zeran v. America Online, Inc. (AOL)*, where the Circuit Court concluded that (under Section 230 CDA) it is prohibited to impose computer service providers liability for user-generated content regardless of whether they are to be considered as publishers

separate court systems: the State courts and the Federal courts. Usually, the cases concerning the US Constitution are ruled by the Federal courts. The Federal Supreme Court is the highest court in Constitutional issues and it has the final say over which rights are protected by the Constitution and when they are violated. See more on the United States of America, Administrative Office of the U.S. Courts, ‘Why Two Court Systems?’, website of the United States Courts, <<http://www.uscourts.gov/educational-resources/get-informed/federal-court-basics.aspx>>, 12 January 2015.

⁸⁵ *Stratton Oakmont v. Prodigy*, 1995 WL 323710 (N.Y. Sup. Ct. 1995), 24 May 1995.

⁸⁶ Court referred to the case of *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), 25 June 1974.

⁸⁷ See also Mullooly, Paula, ‘Liability for Defamatory Statements on The Internet: A Comparative Overview’, 1 *Hibernian Law Journal* (2000), 202–225, at 204–205.

⁸⁸ The principal concern regarded the possible ‘chilling effect’ for the ISPs. See Steele, Shari, ‘Taking a Byte Out of the First Amendment – How Free is Speech in Cyberspace’, 23 *Human Rights* 1 (1996), 14–16, at 14.

⁸⁹ Communications Decency Act, *supra* note 57.

⁹⁰ Cited in Mullooly, ‘Liability for Defamatory Statements’, *supra* note 87, at 205.

(‘content providers’) or distributors (‘hosts’).⁹¹ The court came to this conclusion after deciding that the purpose of Section 230 CDA is to minimize the amount of Government regulation and to encourage service providers to self-regulate.⁹² Moreover, the court stressed that while it would be impossible for the service providers to screen the vast amount of information transmitted via their services, applying tort liability to them would have an obvious ‘chilling effect’.⁹³ In addition, the Supreme Court rejected the use of ‘notice-and-takedown systems’. It stated that these systems only create ‘a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not’. Furthermore, since any efforts to screen the posted material would probably lead to more notifications thereby creating a stronger basis for liability, the service providers might just ‘eschew any attempts at self-regulation’. The Supreme Court refused Zeran’s appeal without a comment, much to the delight of service providers.

Accordingly, the opinion given in the case of *Zeran* established an extensive freedom of liability for all online operators. Hence, even if user-generated online speech falls under the afore-described exemptions from the protection of First Amendment, the online operator facilitating its distribution cannot be held responsible for it. It will be interesting to see whether this same approach has been adopted in the framework of the Council of Europe.

⁹¹ *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), 12 November 1997. Zeran had sued AOL alleging that it had acted negligently in allowing a prankster to post wrongful messages with Zeran’s phone number on them, and by not responding quickly enough to Zeran’s requests to stop the postings.

⁹² See on this Mullooly, ‘Liability for Defamatory Statements’, *supra* note 87, at 206.

⁹³ The court stated the following: ‘It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect...’

PART I: COUNCIL OF EUROPE BEFORE INTERNET

1 Defining Freedom of Expression and Hate Speech

1.1 Definition of Freedom of Expression

1.1.1 Article 10

Article 10 of the European Human Rights Convention stands as follows:

‘1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.’

Thus, Article 10(1) establishes the right to freedom of expression as ‘a compound right’, which entails three main elements: (i) ‘the right to hold opinions’, (ii) ‘the right to receive information and ideas’, and (iii) ‘the right to impart information and ideas’.⁹⁴ Furthermore, as a matter of principle, Article 10 protects all kinds of expressions notwithstanding their content or who has disseminated them: an individual, a group, or any type of media.⁹⁵ Article 10(2), however, lists the specific criteria based on which the aforementioned rights can be restricted. These criteria require that every restriction must be ‘described by law’ and ‘necessary in a democratic society’ in order to pursue at least one of the specific aims listed

⁹⁴ McGonagle, Tarlach, ‘A Survey and Critical Analysis of Council of Europe Strategies for Countering ‘Hate Speech’ in Herz, Michael and Molnar, Peter (eds.), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press, 2012), 456–498, at 459.

⁹⁵ Macovei, Monica, *Freedom of Expression: a Guide to the Implementation of Article 10 of the European Convention on Human Rights* (Human Rights Handbooks No. 2, Council of Europe Publishing, 2004), at 7.

in the paragraph. In addition, in its praxis the ECtHR has highlighted that all restrictions imposed on freedom of expression must be ‘proportionate to the legitimate aim pursued’.⁹⁶

The drafting work of Article 10 was heavily influenced by that of Article 19 of the International Covenant on Civil and Political Rights (ICCPR), adopted by the United Nations General Assembly in 1966.⁹⁷ During the drafting of these Articles, different opinions existed regarding whether the respective provisions should specifically state that the right to freedom of expression is not absolute but ‘carries with it duties and responsibilities’.⁹⁸ The winning proposals stated the following:

‘In the view of the powerful influence the modern media and the expression exerted upon the minds of men and upon national and international affairs, the “duties and responsibilities” in the exercise of the right to freedom of expression should be specifically emphasized.’⁹⁹

Accordingly, the notion of ‘duties and responsibilities’ was added to the final formulations of both provisions.¹⁰⁰ A similar debate existed regarding the listing of specific aims justifying the restrictions. In this debate, the drafters of the two Articles settled on differing approaches. Accordingly, the key difference between said Articles is that, unlike Article 19 ICCPR, Article 10(2) ECHR entails a list of legitimate aims which might justify a restriction of freedom of expression provided that this restriction is also ‘prescribed by law’ and ‘necessary in a democratic society’. The rationale behind this approach was best expressed by the minority in the drafting of Article 19 ICCPR, as quoted in the preparatory works of Article 10 ECHR:

⁹⁶ See among other authorities *Handyside v. the United Kingdom*, Application no. 5493/72, 7 December 1976, § 49.

⁹⁷ United Nations, International Covenant on Civil and Political Rights, *supra* note 7.

⁹⁸ See European Commission of Human Rights Preparatory Work on Article 10 of the European Convention on Human Rights, Strasbourg, 17 August 1956, DH (56)15, § 22.

⁹⁹ *Ibid.*, § 127.

¹⁰⁰ However, in the case of Article 19(3) ICCPR word ‘special’ was added before it as a compromise. ICCPR, Article 19 stands as follows: (1) ‘Everyone shall have the right to hold opinions without interference. (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.’

*'It is susceptible of arbitrary interpretation and application; that if the Covenant was to be a satisfactory legal instrument permissible restrictions on freedom of expression should be set forth in precise unequivocal language, and that a wider degree of freedom of expression would be ensured where limitations were enumerated carefully and in detail.'*¹⁰¹

1.1.2 Prohibition of abuse of rights

Under the law of the Convention, in addition to the criteria listed in Article 10(2) ECHR, freedom of expression can be restricted on the basis of 'prohibition of abuse of rights' under Article 17 ECHR, which reads as follows:

'Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.'

Article 17 was included to prevent the abuse of the Convention by those whose intentions are 'contrary to the letter and spirit' of it and those who wish to 'attack the fundamental values of the treaty or European democracy'.¹⁰² However, few explanations of this provision were provided before its adoption.¹⁰³ Statements made in the Parliamentary Assembly of the Council of Europe (hereinafter 'the Parliamentary Assembly' or 'the Assembly') referred to experiences of Nazism, fascism and communism, and called for 'a vehicle in order to construct a democratic community able to defend itself'.¹⁰⁴ Essentially, Article 17 ECHR applies to those Convention rights that could be exploited as a right to engage in activities that abuse the rights or freedoms recognized in the Convention.¹⁰⁵ Freedom of expression has been recognized as such a right.

¹⁰¹ See European Commission of Human Rights Preparatory Work on Article 10, *supra* note 98, § 130.

¹⁰² Keller, Perry, *European and International Media Law* (Oxford University Press, 2011), at 390; and McGonagle, 'A Survey and Critical Analysis', *supra* note 94, at 459.

¹⁰³ Van Drooghenbroeck, Sébastien, 'L'Article 17 de la Convention Européenne des Droits De l'Homme Est-Il Indispensable?', *Revue trimestrielle des droits de l'homme* (2001), 541–566, at 542–543.

¹⁰⁴ Cannie, Hannes and Voorhoof, Dirk, 'The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?', 29 *Netherland Quarterly of Human Rights* 1 (2011), 54–83, at 56.

¹⁰⁵ Weber, Anne, *Manual on Hate Speech*, (Council of Europe Publishing, 2009), at 22.

1.2 Freedom of Expression in Practice

1.2.1 Classic case of *Handyside*

In a long series of judgments the Court has emphasized the significance of freedom of expression in a democratic society, where it ‘constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every individual’.¹⁰⁶ Furthermore, the Court has stressed that freedom of expression ‘goes hand in hand with exceptions calling for a strict interpretation, and the need to restrict this right must be determined in a convincing manner’.¹⁰⁷ The Court first established this and other significant principles regarding the application of Article 10 ECHR in 1976, in the classic case of *Handyside v. the United Kingdom*.¹⁰⁸ This case concerned the publication of a Danish schoolbook in the United Kingdom. The book aimed to, among other things, provide sex education for pupils aged 12 and upwards.¹⁰⁹ The British authorities deemed the content of the book obscene, issued a fine, and confiscated the publication. The applicant’s complaints regarding violations of his Article 10 right were later analysed by the Court.¹¹⁰

Since *Handyside*, the Court always begins its analysis of claimed infringements of Article 10 by assessing whether the interference with freedom of expression has been ‘prescribed by law’. In the case of *Handyside*, this criterion was not discussed in too much detail.¹¹¹ However, in subsequent case-law, the Court has interpreted this criterion as requiring that the law in question is foreseeable in a way that a ‘person is able to regulate his or her conduct and foresee, if need be with appropriate advice and to a degree that is reasonable in the circumstances, the consequences which the given actions may entail’.¹¹² The notion of predictability is ‘to a great extent dependent on the contents of the text in question, of its scope and the number and position of the persons to whom it is addressed’.¹¹³ Next, the

¹⁰⁶ See *Handyside v. the United Kingdom*, *supra* note 96, § 49; *Lingens v. Austria*, Application no. 9815/82, 8 July 1986, § 41; *Jersild v. Denmark*, Application no. 15890/89, [GC] 23 September 1994, § 31; and *Murat Vural v. Turkey*, Application no. 9540/07, 21 October 2014, § 61.

¹⁰⁷ Weber, *Manual on Hate Speech*, *supra* note 105, at 30.

¹⁰⁸ *Handyside v. the United Kingdom*, *supra* note 96. See analysis of the case in Mowbray, Alastair, *Cases, Materials, and Commentary on the European Convention on Human Rights* (3rd Edition, Oxford University Press, 2012), at 627–632.

¹⁰⁹ *Handyside v. the United Kingdom*, *supra* note 96, § 11.

¹¹⁰ *Ibid*, § 39.

¹¹¹ *Ibid*, § 44.

¹¹² See among other authorities the cases of *Sunday Times v. the United Kingdom (No. 1)*, Application no. 6538/74, 26 April 1979, § 49; *Müller and Others v. Switzerland*, Application no. 10737/84, 24 May 1988, § 29; *Goodwin v. the United Kingdom*, Application no. 17488/90, [GC] 27 March 1996, § 31; and *Lahtonen v. Finland*, Application no. 29576/09, 17 January 2012, § 57.

¹¹³ Weber, *Manual on Hate Speech*, *supra* note 105, at 31.

Court analyses the necessity of the interference. In the case of *Handyside*, the Court adopted, for the first time, the view that the notion of ‘necessary in a democratic society’ corresponds to the existence of ‘a pressing social need’.¹¹⁴ Moreover, interference with the protected right must not be greater than is necessary to address this need. This requirement is referred to as the ‘principle of proportionality’.¹¹⁵ Furthermore, the Court has established that when analysing the existence of ‘pressing social need’, it must give due regard to the ‘margin of appreciation’ afforded to the domestic authorities by Article 10(2).¹¹⁶ The idea behind the notion of ‘margin of appreciation’ is that domestic authorities are ‘in a better position than the international judge’ to analyse the situation of their respective country, and to decide on whether it is necessary to impose a ‘restriction’ or a ‘penalty’ for certain acts. Accordingly, the Court is not to take the place of the competent domestic courts but to review under Article 10 the decisions made in the exercise of their power of appreciation.¹¹⁷ When conducting its review the Court takes into account the specific circumstances of the case ‘in the light of the case as a whole’. This way, the domestic ‘margin of appreciation’ goes ‘hand in hand with a European supervision’.¹¹⁸ It is, however, always up to the Court to decide whether the justifications given by the domestic authorities for the interference are ‘relevant and sufficient’ from the perspective of Article 10(2) ECHR.¹¹⁹

Another significant principle the Court first adopted in *Handyside* is that, subject to Article 10(2), freedom of expression covers not only ‘information’ or ‘ideas’ that are ‘favourably received or regarded as inoffensive or as a matter of indifference’ but also those that ‘offend, shock or disturb’.¹²⁰ In its later praxis, the Court has further developed this idea and stressed

¹¹⁴ *Handyside v. the United Kingdom*, *supra* note 96, § 48. For subsequent case-law see, among other authorities, *Lingens v. Austria*, *supra* note 106, § 39; *Lehideux and Isorni v. France*, Application no. 24662/94, [GC] 23 September 1998, § 51; and *Mouvement Raëlien Suisse v. Switzerland*, Application no. 16354/06, [GC] 13 July 2012, § 48.

¹¹⁵ See Ovey & White, *The European Convention*, 5th Edition, *supra* note 3, at 325. See the case of *Silver v. the United Kingdom*, Application nos 5947/72, 6205/73, 7052/75, 706175, 7113/75 and 7136/75, 25 March 1983, § 97.

¹¹⁶ See on ‘margin of appreciation’ Mowbray, *Cases, Materials, and Commentary*, *supra* note 108, at 633–644.

¹¹⁷ In the case of *Handyside* the domestic authorities enjoyed a wider ‘margin of appreciation’ because the Court found it impossible ‘to find in the domestic law of the various Contracting States a uniform European conception of morals’. Later the Court has afforded a wider ‘margin of appreciation’ also with regard to ‘hate speech’ cases. See among other authorities *Lindon, Otchakovsky-Laurens and July v. France*, Application nos 21279/02 and 36448/02, [GC] 22 October 2007.

¹¹⁸ *Handyside v. the United Kingdom*, *supra* note 96, §§ 48–49. For subsequent case-law see, among other authorities, *Lingens v. Austria*, *supra* note 106, §§ 39–40; *Lehideux and Isorni v. France*, *supra* note 114, § 51; and *Mouvement Raëlien Suisse v. Switzerland*, Application no. 16354/06, [GC] 13 July 2012, § 48.

¹¹⁹ *Handyside v. the United Kingdom*, *supra* note 96, § 50. See also Hirvelä & Heikkilä, *Ihmisoikeudet*, *supra* note 18, at 511–512. For more detailed analysis see Ovey & White, *The European Convention*, 5th Edition, *supra* note 3, at 325–332.

¹²⁰ *Handyside v. the United Kingdom*, *supra* note 96, § 49. For subsequent case-law see, among other authorities, *Lingens v. Austria*, *supra* note 106, § 41; *Erdoğan and İnce v. Turkey*, Application nos 25067/94

the significance of taking into account the individual and minority viewpoints to avoid the risk of public debate turning into ‘the preserve of majoritarian, mainstream and orthodox opinion’.¹²¹ In *Handyside*, the Court concludes its analysis by deciding that there had been no breach of Article 10 because the restrictions fell within the scope of the criteria established in Article 10(2) ECHR.¹²² Nevertheless, the aforementioned principles continue to form the starting point for the Court’s analysis of cases alleging a violation of freedom of expression.

1.2.2 Special protection afforded to media

Although Article 10 does not specifically refer to any group, special protection is afforded to the press and media professionals in the Court’s case-law. The Court has stated the following:

‘These principles are of particular importance as far as the press is concerned. Whilst it must not overstep the bounds set... it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog”.’¹²³

This special protection covers several different aspects of journalistic activities such as the freedom to report on matters of public interest, as well as presentational and editorial freedom.¹²⁴ The Court has also noted that this protection has implications for the domestic authorities’ ‘margin of appreciation’, which is restricted when the author of the expression concerned is a journalist ‘fulfilling his social duty’.¹²⁵ However, to counterbalance the special protection, the Court has also stressed the responsibilities of media professionals.

and 25068/94, [GC] 8 July 1999, § 47; *Von Hannover v. Germany (No. 2)*, Application nos 40660/08 and 60641/08, [GC] 7 February 2012, § 101.

¹²¹ See on this McGonagle, ‘A Survey and Critical Analysis’, *supra* note 94, at 460. See from the Court’s case-law, among other authorities, *Young, James and Webster v. the United Kingdom*, Application nos 7601/76 and 7806/77, 13 August 1981, § 63; and *Steel and Morris v. the United Kingdom*, Application no. 68416/01, 15 February 2005, § 89.

¹²² *Handyside v. the United Kingdom*, *supra* note 96, §§ 11 and 39, and the judgment §§ 1 and 2.

¹²³ See *Observer and Guardian v. the United Kingdom*, Application no. 13585/88, 26 November 1991, § 59 and *Lingens v. Austria*, *supra* note 106, § 41.

¹²⁴ McGonagle, Tarlach, ‘User Generated Content and Audiovisual News: The Ups And Downs of an Uncertain Relationship in Open Journalism’, *IRIS Plus 2013-2 “Open Journalism”*, European Audiovisual Observatory, April 2013, available at

<<http://www.obs.coe.int/documents/205595/865106/IRIS+plus+2013en2+LA.pdf/31de1179-1b3e-4a11-90a2-3433fe592d17>>, 4 January 2015, at 13.

¹²⁵ Ovey & White, *The European Convention*, 5th Edition, *supra* note 3, at 433.

These responsibilities follow from the Court's recognition that, in the hands of the mass media, free expression is a powerful tool, which can be used also to incite violence and spread hatred.¹²⁶ Accordingly, the Court has stated that journalists' right to impart information on matters of public interest is protected provided that they act in good faith, on an accurate factual basis, and provide 'reliable and precise' information in accordance with the ethics of journalism.¹²⁷ In other words, from the enjoyment of special protection follows 'the expectation of adherence to professional ethics and codes of conduct'.¹²⁸ With this regard, the Court has stated the following:

*'In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance.'*¹²⁹

It should be noted, however, that the Court has not been entirely unanimous in this tendency to stress journalistic responsibilities.¹³⁰ Criticism from inside the Court is reflected in a number of dissenting opinions.¹³¹ Also academic commentators have expressed their disapproval towards shifting the balance away from the freedom of the press towards its responsibilities.¹³² According to them, it is not for the Court to combine legal and ethical issues in this way. They are afraid that it might result in 'journalistic practices assuming greater importance than the public's right to receive information and the media's right to

¹²⁶ Barendt, *Freedom of Speech*, 2nd edition, *supra* note 24, at 424; and Ovey & White, *The European Convention*, 5th Edition, *supra* note 3, at 426.

¹²⁷ *Pedersen and Baadsgaard v. Denmark*, Application no. 49017/99, [GC] 17 December 2004, § 78; *Pladet Strømsø and Stensaas v. Norway*, Application no. 21980/93, [GC] 20 May 1999, § 65; *Goodwin v. the United Kingdom*, *supra* note 112, § 39; *Fressoz and Roire v. France*, Application no. 29183/95, [GC] 21 January 1999, § 54; *Stoll v. Switzerland*, Application no. 69698/01, [GC] 10 December 2007, § 104.

¹²⁸ McGonagle, 'User Generated Content', *supra* note 124, at 13.

¹²⁹ See *Stoll v. Switzerland*, *supra* note 127, § 104. The Court has, however, never defined the ethics of journalism. See with this regard Parliamentary Assembly, Resolution 1003 (1993) on the ethics of journalism, adopted on 1 July 1993; and Commissioner for Human Rights, 'Ethical journalism and human rights', Issue discussion paper (updated version), 8 November 2011, CommDH (2011)40.

¹³⁰ McGonagle, 'User Generated Content', *supra* note 124, at 14.

¹³¹ See, inter alia, the dissenting opinions left in connection with the cases of *Stoll v. Switzerland*, *supra* note 127; *Guja v. Moldova*, Application no. 14277/04, [GC] 12 February 2008; and *Flux v. Moldova (No. 6)*, Application no. 22824/04, 29 July 2008.

¹³² See, inter alia, Voorhoof, Dirk, 'Seminar on the European Protection of Freedom of Expression: Reflections on Some Recent Restrictive Trends', Some conclusions and outlook, A Seminar at the European Court of Human Rights, 10 October 2008,

<http://www.psw.ugent.be/Cms_global/uploads/publicaties/dv/05recente_publicaties/VoorhoofFinalconclusions15.10.FINALVERSION.pdf>, 4 January 2015. See also McGonagle, 'User Generated Content', *supra* note 124, at 14.

impart it'.¹³³ Moreover, Tarlach McGonagle has pointed out that an undue emphasis on journalists' responsibilities can create a 'chilling effect' on freedom of expression.¹³⁴ This criticism should be kept in mind when discussing the imposition of liabilities on the media and, therefore, during the course of this research.

1.3 Definition of Hate Speech

Defining 'hate speech' is by no means a simple task since no universally accepted definition of this term exists. The term was first used by the Council of Europe in 1997, when the Committee of Ministers of the Council of Europe (hereinafter 'the Committee of Ministers' or 'the Committee') adopted its Recommendation on 'hate speech'.¹³⁵ According to this Recommendation, 'hate speech' encompasses the following:

*'[A]ll forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism, or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination, and hostility towards minorities, migrants, and people of immigrant origin.'*¹³⁶

Although the Court has referred to this definition, the references have been neither frequent nor comprehensive enough to make this definition the Court's binding interpretation of the term.¹³⁷ As a result, Member States are not legally bound by this definition and it mainly acts as a helpful guideline.¹³⁸

Although reluctant to rely purely on the definition provided by the Committee, the Court has also refrained from trying to define 'hate speech' itself. As with many other notions, the Court prefers to analyse each case on its own merits and avoid being constrained by definitions that could limit its actions in the future.¹³⁹ The Court has, however, continuously

¹³³ McGonagle, 'User Generated Content', *supra* note 124, at 14.

¹³⁴ *Ibid.* See on 'chilling effect' among other authorities the case of *Goodwin v. the United Kingdom*, *supra* note 112.

¹³⁵ Recommendation No. R (97) 20 of the Committee of Ministers to the Member States on 'hate speech', adopted on 30 October 1997 at the 607th meeting of the Ministers' Deputies. See McGonagle, 'A Survey and Critical Analysis', *supra* note 94, at 456.

¹³⁶ Recommendation No. R (97) 20, *supra* note 135, Appendix, Scope.

¹³⁷ See, *inter alia*, the case of *Gündüz v. Turkey*, Application no. 35071/97, 4 December 2003, § 22.

¹³⁸ McGonagle, 'A Survey and Critical Analysis', *supra* note 94, at 466.

¹³⁹ Oetheimer, Mario, 'Protecting Freedom of Expression: the Challenge of Hate Speech in the European Court of Human Rights Case Law', 17 *Cardozo Journal of International and Comparative Law* (2009), 427–443, at 428–429.

stressed that ‘it is particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations’.¹⁴⁰ Moreover, the Court has emphasized in various judgments that ‘tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society’. From these findings, the Court has derived the following rule:

‘As a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance, provided that any “formalities”, “conditions”, “restrictions” or “penalties” imposed are proportionate to the legitimate aim pursued.’¹⁴¹

Moreover, the Court has not abstained from using the term ‘hate speech’. It first appeared in the Court’s argumentation in four judgments given against Turkey in 1999.¹⁴² The case of *Sürek v. Turkey (No. 1)* concerned the publication of two readers’ letters in a Turkish news review and the subsequent conviction of the owner of said review for disseminating propaganda against the indivisibility of the State. In its judgment, the Court first reiterates the principle adopted in the aforementioned *Handyside* case according to which ‘the mere fact that “information” or “ideas” offend, shock, or disturb does not suffice to justify’ an interference.¹⁴³ The Court then continues by stating that ‘what is in issue in the instant case, however, is “hate speech” and the glorification of violence’.¹⁴⁴ Thus, instead of finding a violation of Article 10 ECHR, the Court established a new category of expressions that do not fall under the scope of protection offered by the principles set forth in *Handyside*. ‘Hate speech’ is something qualitatively different from speech that just offends, shocks or disturbs.¹⁴⁵

¹⁴⁰ *Jersild v. Denmark*, *supra* note 106, § 30.

¹⁴¹ See among other authorities the cases of *Gündüz v. Turkey*, *supra* note 137; and *Erbakan v. Turkey*, Application no. 59405/00, 6 July 2006, § 56.

¹⁴² *Sürek v. Turkey (No. 1)*, Application no. 26682/95, [GC] 8 July 1999, § 62; *Sürek and Özdemir v. Turkey*, Application nos 23927/94 and 24277/94, [GC] 8 July 1999, § 63; *Sürek v. Turkey (No. 4)*, Application no. 24762/94, [GC] 8 July 1999, § 60; and *Erdoğan and İnce v. Turkey*, *supra* note 120, § 54.

¹⁴³ *Handyside v. the United Kingdom*, *supra* note 98, § 49.

¹⁴⁴ *Sürek v. Turkey (No. 1)*, *supra* note 142, § 62.

¹⁴⁵ McGonagle, ‘The Council of Europe against Online Hate Speech’, *supra* note 31, at 10; and McGonagle, ‘A Survey and Critical Analysis’, *supra* note 94, at 464. The judgment was criticized because the Court failed to explain the newly adopted term, its intended purpose, and its relationship with the existent body of case-law. See on this McGonagle, ‘The Council of Europe against Online Hate Speech’, *supra* note 31, at 10.

Following the judgment in *Sürek*, the term ‘hate speech’ has continued to appear in the Court’s case-law, and in a number of other documents drafted by the Council of Europe.¹⁴⁶ However, it can be argued that since there is neither legally binding nor otherwise authoritative definition of the term, it is susceptible to both over and under exclusive interpretations.¹⁴⁷ For example, McGonagle has stressed that, especially from the perspective of legal certainty and foreseeability, the Court should provide a clear sense of what ‘hate speech’ entails. In McGonagle’s view, the Court’s use of the term has been neither systematic nor consistent. He notes, for example, that sometimes the term does not appear in the Court’s argumentation at all, although the type of expression in question seems to fall in the scope of classic ‘hate speech’ examples.¹⁴⁸ This was the situation, inter alia, in the case of *Norwood v. the United Kingdom*, which concerned the conviction of a far-right party politician for displaying a poster in his window presenting the Twin Towers in flames with the text ‘Islam out of Britain – Protect the British People’ and a symbol of crescent and star in prohibition signs. In its judgment, the Court refrains from use of the term, but states the following:

*‘Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination.’*¹⁴⁹

Thus, it seems that the Council has failed to adopt a clear definition of ‘hate speech’. A more detailed analysis of the rules and principles adopted by the Council bodies, and especially the Court, is required to form an understanding of what constitutes ‘hate speech’.

¹⁴⁶ See among other authorities the case of *Gündüz v. Turkey*, *supra* note 137.

¹⁴⁷ McGonagle, ‘A Survey and Critical Analysis’, *supra* note 94, at 457.

¹⁴⁸ *Ibid.*, at 464.

¹⁴⁹ *Norwood v. the United Kingdom*, Application no. 23131/03, decision of 16 November 2004, § 4.

2 Adopted Strategies: hate speech and media liability

Despite the lack of clear definition, the Council of Europe has adopted a number of strategies in an attempt to counter ‘hate speech’. These strategies are being put into operation via different means including treaty-based approaches; monitoring systems; political and policy making measures; and educational, informational and cultural initiatives.¹⁵⁰ Moreover, from early on, the Council’s work against incitement to hatred has highlighted the important role of the media. As Perry Keller has expressed, ‘the media has been identified not only as the primary vehicle responsible for the spread of ethnic hatred but also as the most important positive influence in fostering greater tolerance’.¹⁵¹

2.1 Treaty-Based Strategies

The media’s potential role in inciting hatred was first brought forward at a treaty-based level in the 1989 Convention on Transfrontier Television, which requires State Parties to ensure that television programmes provided by broadcasters under their jurisdiction do not contain any forms of incitement to racial hatred.¹⁵² To date, however, only 34 States have ratified this convention, and its revision was discontinued in 2009 due to claims made by the EU, who has acquired exclusive competence in this field.¹⁵³ Accordingly, the status of this convention remains unclear.¹⁵⁴

Another important convention in this context is the Framework Convention for the Protection of National Minorities (FCNM), adopted by the Committee of Ministers in 1994.¹⁵⁵ The provisions of particular relevance here are (i) Article 6 regarding the

¹⁵⁰ McGonagle, ‘The Council of Europe against Online Hate Speech’, *supra* note 31, at 3.

¹⁵¹ Keller, *European and International Media Law*, *supra* note 102, at 393.

¹⁵² Council of Europe, European Convention on Transfrontier Television, Strasbourg, 5 May 1989, in force 1 May 1993, *European Treaty Series* No. 132. See also Keller, *European and International Media Law*, *supra* note 102, at 393. See, inter alia, Article 7(1) which requires that all broadcast material must in its presentation and content ‘respect the dignity of the human being and the fundamental rights of others’. Furthermore, Article 7(1)(b) requires that programmes shall not ‘give undue prominence to violence or be likely to incite to racial hatred’.

¹⁵³ Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in the Member States concerning the pursuit of television broadcasting activities, 17 October 1989, *Official Journal* L 298, (amended in 2007 by Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, 18 December 2007, *Official Journal of the European Union* L 332).

¹⁵⁴ It should be noted that the Parliamentary Assembly recently encouraged the EU to resume the discussion with the Council in this regard. See Parliamentary Assembly’s Resolution 1978 (2014) Revision of the European Convention on Transfrontier Television, adopted on 31 January 2014; and Recommendation 2036 (2014) Revision of the European Convention on Transfrontier Television, adopted on 31 January 2014.

¹⁵⁵ Council of Europe, Framework Convention for the Protection of National Minorities, Strasbourg, 1 February 1995, in force 1 February 1998, *European Treaty Series* No. 157.

encouragement of a spirit of tolerance and intercultural dialogue, and (ii) Article 9 regarding freedom of expression and access to media.¹⁵⁶ According to McGonagle, FCNM's principal strategy for countering 'hate speech' is based on the 'synergistic interaction' between these two Articles. They both endorse pre-emptive measures and seek to address the problem of 'hate speech' before it actually occurs. McGonagle argues that emphasizing 'the need to foster, including via the media, improved interethnic and intercultural understanding and tolerance through the development of dialogical relationships between communities' is key to achieving this aim.¹⁵⁷ Unfortunately, as the name of the FCNM suggests, the convention is only a 'framework' and, therefore, allows great leeway to State Parties, which are, *inter alia*, allowed to implement the programmatic provisions of the convention in a way that reflects the circumstances prevailing in their country. This has undoubtedly reduced the impact of the FCNM. However, the implementation of the provisions is assessed through a system of State-monitoring conducted by the so-called Advisory Committee, which has brought added value to the convention by taking an active approach towards its task.¹⁵⁸ In its opinions to the country reports submitted by the State Parties, the Advisory Committee has recognized, *inter alia*, the important role media plays in the transmission and legitimization of minority cultures.¹⁵⁹ Furthermore, the Committee has constantly stressed the significance of special training for journalists on minority issues.¹⁶⁰

2.2 Standard-Setting Texts

Due to the lack of legally binding documents tackling issues of 'hate speech', many standard-setting texts have been adopted in the auspices of the Council with this regard. Although not legally binding, these 'soft law' instruments should not be overlooked. They carry out the important task of indicating 'the normative status quo in relation to their subject matter' or the direction in which the body that adopted them would wish 'future law and policy to develop'.¹⁶¹ At its best, application of these instruments might help to overcome a 'deadlock

¹⁵⁶ McGonagle, 'The Council of Europe against Online Hate Speech', *supra* note 31, at 19.

¹⁵⁷ McGonagle, 'A Survey and Critical Analysis', *supra* note 94, at 468.

¹⁵⁸ *Ibid.*, at 467.

¹⁵⁹ This is a specific aim stemming from the wording of Article 9(4) FCNM which reads: 'the Parties shall adopt adequate measures in order to facilitate access to the media for persons belonging to national minorities and in order to promote tolerance and permit cultural pluralism'. See Treaty Office, Framework Convention on National Minorities, available at <<http://www.coe.int/en/web/minorities/monitoring>>, 3 January 2015.

¹⁶⁰ See among other the Opinion on Albania, Strasbourg, 12 September 2002, ACFC/INF/OP/I(2003)004, § 98; Opinion on Lithuania, Strasbourg, 21 February 2003, ACFC/INF/OP/I(2003)008, § 45; Opinion on Spain, Strasbourg, 27 November 2003, ACFC/INF/OP/I(2004)004, § 63; Opinion on Sweden, Strasbourg, 25 August 2002, ACFC/INF/OP/I(2003)006, §§ 34 and 78; and Opinion on Ukraine, Strasbourg, 1 March 2002, ACFC/INF/OP/I(2002)010, § 39.

¹⁶¹ McGonagle, 'A Survey and Critical Analysis', *supra* note 94, at 474.

in relations between States' pursuing conflicting interests or ideologies. They might, for example, form the first step in reaching an international consensus on the formulation or outright adaption of new human rights provisions.¹⁶² Although initially adopted as a standard-setting instrument, this type of document may later turn into a binding custom or become the basis of a treaty.¹⁶³

European Commission against Racism and Intolerance

In 1993, the Heads of State and Government of the Council of Europe adopted a Declaration on Combating Racism, Xenophobia, Anti-Semitism and Intolerance later often referred to as the Vienna Declaration.¹⁶⁴ In this Declaration, Member States express their disapproval towards the reappearance of racism in Europe, and urge co-operation in suppressing such racist activities. One of the collective initiatives adopted to achieve this goal foresees the establishment of the European Commission against Racism and Intolerance (ECRI). Today, ECRI operates as the Council's monitoring body on the effort to suppress the evils listed in the title of the Vienna Declaration.¹⁶⁵ With its fourteen existing General Policy Recommendations (GPRs), ECRI has dealt with several 'hate speech' related issues.¹⁶⁶ The first GPR was adopted in 1996 and it calls Member States to ensure, first of all, that their domestic laws 'expressly and specifically' combat racism, xenophobia, anti-Semitism and intolerance. ECRI has also highlighted the importance of active and constant use of 'criminal prosecution of offences of a racist or xenophobic nature', as well as that of organizing training courses for public officials 'promoting cultural sensitivity, awareness of prejudice and knowledge of legal aspects of discrimination'.¹⁶⁷ Moreover, in GPR No. 2 adopted in 1997, ECRI stresses the establishment of independent specialized bodies, such as national

¹⁶² Harris, David, *Cases and Materials on International Law* (5th Edition, Sweet and Maxwell Limited, St Ives, 1998), at 64–65. See with regard to international economic law Seidl-Hohenveldern, Ignaz, 'International Economic "Soft-Law"', in *Collected Courses of The Hague Academy of International Law* (Volume 163, Brill/Nijhoff, Leiden, 1979), 165–246, at 193.

¹⁶³ For example the Universal Declaration on Human Rights was first a 'soft law' instrument that later hardened into international custom. See United Nations, Universal Declaration of Human Rights, Paris, 10 December 1948, General Assembly Resolution 217 A (III), UN Doc. A/810. See also Harris, *Cases and Materials*, *supra* note 162, at 65.

¹⁶⁴ Declaration of the Summit of Heads of State and Government, Vienna, 9 October 1993, reprinted in in 14 *Human Rights Law Journal* (1993) 373.

¹⁶⁵ Keller, *European and International Media Law*, *supra* note 102, at 393.

¹⁶⁶ For all GPRs see ECRI, 'General Policy Recommendations (GPR)', available at <http://www.coe.int/t/dghl/monitoring/ecri/activities/GeneralThemes_en.asp>, 12 January 2015.

¹⁶⁷ General Policy Recommendation No. 1 on Combating Racism, Xenophobia, Antisemitism and Intolerance, CRI(96)43 rev, 4 October 1996. Note with this regard also General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, 13 December 2002, CRI(2003)8.

commissions, ombudsmen, or specialized Centres, to carry out the combat recognized in GPR No. 1.¹⁶⁸

Along with adopting GPRs, ECRI carries out country-by-country monitoring of all the Member States of the Council. No sanctions follow from a State's failure to implement ECRI's recommendations, but the monitoring results are public, which can create political pressure. In the context of this research, it is interesting to note that in its recommendations ECRI has repetitively urged domestic authorities to adopt 'particular vigilance' in identifying and prosecuting cases of incitement to or dissemination of hatred by media professionals.¹⁶⁹ In addition to stressing the importance of proper legislation and its enforcement, ECRI has also emphasized the importance of self-regulatory codes adopted by the media sector.¹⁷⁰

Committee of Ministers

Perhaps the most active of the Council's non-specialized bodies in tackling 'hate speech' has been the Committee of Ministers. It is the Council's decision-making body comprising of Foreign Affairs Ministers or permanent diplomatic representatives of all the Member States.¹⁷¹ It became involved in the issue of media impact on incitement to racial and other forms of hatred when it adopted the two complementary recommendations dealing with the issue in 1997.

First of the two was the aforementioned Recommendation No. R (97) on 'hate speech', which deals with the potential negative role of the media in the propagation of 'hate speech'.¹⁷² As mentioned above, it has later become one of the key points of reference for

¹⁶⁸ General Policy Recommendation No. 2 on Specialised Bodies to Combat Racism, Xenophobia, Antisemitism and Intolerance at National Level, 13 June 1997, CRI(97)36.

¹⁶⁹ See, inter alia, ECRI Report on the Czech Republic (Third monitoring cycle): adopted on 5 December 2003, 8 June 2004, CRI(2004)22, § 65; and ECRI Report on Sweden (Third monitoring cycle): adopted on 17 December 2004, 14 June 2005, CRI(2005)26, § 9. See also McGonagle, 'A Survey and Critical Analysis', *supra* note 94, at 489. On the other hand, ECRI has also encouraged the prosecution and punishment of the authors or publishers of racist articles. See on this ECRI Report on Estonia (Third monitoring cycle): adopted on 24 June 2005, 21 February 2006, CRI(2006)1, § 115; and ECRI Report on Bulgaria (Fifth monitoring cycle): adopted on 19 June 2014, 16 September 2014, CRI(2014)36, § 35.

¹⁷⁰ Calling for the adoption of such a code see, inter alia, ECRI Report on Austria (Third monitoring cycle): adopted on 25 June 2004, 15 February 2005, CRI(2005)1, § 73; and Czech Republic, *supra* note 169, § 65. And calling for the implementation of such a code see, inter alia, for ECRI Report on Norway (Third monitoring cycle): adopted on 27 June 2003, 27 January 2004, CRI(2004)3, § 80; and ECRI Report on 'the former Yugoslav Republic of Macedonia' (Third monitoring cycle): adopted on 25 June 2004, 15 February 2005, CRI(2005)4, § 94. See also McGonagle, 'A Survey and Critical Analysis', *supra* note 94, at 489.

¹⁷¹ See Committee of Ministers, 'About the Committee of Ministers', <http://www.coe.int/T/CM/aboutCM_en.asp>, 3 January 2015.

¹⁷² Recommendation No. R (97) 20 on 'hate speech', *supra* note 135.

the Court and the Council of Europe in general with regard to ‘hate speech’.¹⁷³ The principles annexed to the Recommendation encourage Member States to ‘establish or maintain a sound legal framework consisting of civil, criminal and administrative law provisions on hate speech’ enabling authorities to reconcile each case by taking into consideration the different interests at stake.¹⁷⁴ However, at the same time Member States should remember that any interference with the freedom of expression must be ‘narrowly circumscribed and applied in a lawful and non-arbitrary manner on the basis of objective criteria’.¹⁷⁵ Moreover, Member States are reminded that a distinction must be made between ‘the responsibility of the author of expressions of “hate speech” on one hand, and any responsibility of the media and media professionals contributing to their dissemination as part of their mission to communicate information and ideas on matters of public interest on the other hand’.¹⁷⁶ In other words, Article 10 protects the act of reporting ‘hate speech’ and thus any restriction to this right must meet the criteria set forth in Article 10(2). In addition, when deciding on any restrictions, domestic authorities must take due regard of the consideration afforded in the Court’s case-law to ‘the manner, contents, context and purpose of the reporting’.¹⁷⁷

The second recommendation, adopted by the Committee in 1997, was the Recommendation No. R (97) 21 on the media and the promotion of a culture of tolerance, which concentrates on the positive role of the media in combating ‘hate speech’.¹⁷⁸ It urges the Member States to promote the training of media professionals to counter intolerance.¹⁷⁹ Moreover, it emphasizes the importance of encouraging journalists to make a positive contribution towards the development of tolerance and mutual understanding between the different groups of society.¹⁸⁰ According to the Recommendation, such aims could be implemented, for example, in the ‘codes of conduct’ drafted by different sectors of the media.¹⁸¹

¹⁷³ See among other authorities *Balsytė-Lideikienė v. Lithuania*, Application No. 72596/01, decision of 4 November 2008 and *Gündüz v. Turkey*, *supra* note 137. See also Keller, *European and International Media Law*, *supra* note 102, at 394.

¹⁷⁴ Recommendation No. R (97) 20, *supra* note 135, Appendix, § 2.

¹⁷⁵ *Ibid*, § 3.

¹⁷⁶ *Ibid*, § 6. See also the judgment in the case of *Jersild v. Denmark*, *supra* note 106. The impact of this case is evident in the Recommendation also more generally. See also McGonagle, ‘The Council of Europe against Online Hate Speech’, *supra* note 31, at 21; and the Explanatory Memorandum to Recommendation No. R (97) 20, *supra* note 135, §§ 19, 30, 38, and 46 et seq.

¹⁷⁷ Recommendation No. R (97) 20, *supra* note 145, Appendix, § 7.

¹⁷⁸ Recommendation No. R(97) 21 of the Committee of Ministers to the Member States on the media and the promotion of culture of tolerance, adopted on 30 October 1997 at the 607th meeting of the Minister’s Deputies.

¹⁷⁹ *Ibid*, Appendix, § 1. Training.

¹⁸⁰ McGonagle, ‘The Council of Europe against Online Hate Speech’, *supra* note 31, at 22.

¹⁸¹ Recommendation, No. R (97) 21, *supra* note 178, Appendix, § 4. Codes of Conduct.

Parliamentary Assembly

The Parliamentary Assembly has also shown considerable activity regarding media and ‘hate speech’ issues. The Assembly is a political body comprised of 318 members from the parliaments of the Member States. It gathers four times a year to discuss topical issues.¹⁸² As early as 1970, it adopted a Recommendation on mass communication media and human rights, where Member States are called to encourage media organizations to ‘draw up a professional code of ethics for journalists’.¹⁸³ Later, in 1993, the Assembly adopted its own Resolution on the ethics of journalism stressing the importance of setting up self-regulatory bodies by the media.¹⁸⁴ Moreover, similarly to the Committee of Ministers, the Assembly has noted the significant influence media portrayal of immigrants and ethnic minorities has on public opinion. It has asked Member States to encourage both public and private media ‘to play a responsible role in combating racism and xenophobia through objective coverage of migrant and ethnic minority issues’.¹⁸⁵ In addition, the Assembly has adopted a considerable body of texts focusing especially on the complex issues arising from the relationship between freedom of expression, freedom of religion and ‘hate speech’.¹⁸⁶

Nonetheless, the Assembly’s work has concentrated on the effective enforcement of national legislations prohibiting ‘hate speech’.¹⁸⁷ It has, for example, recommended the criminalization of publication, production, or storage of ‘material with a racist content or purpose’; and dissemination ‘anti-Semitic and other hate speech, in particular incitement to violence’.¹⁸⁸ However, simultaneously the Assembly has stressed that ‘only incitement to violence, hate speech and promotion of negationism’ should be punishable by imprisonment, making a clear distinction between these offences and, for example, the act of defamation.¹⁸⁹ Furthermore, the Assembly has emphasized that laws criminalizing ‘hate speech’ have to respect the right to freedom of expression, and any penalties imposed must be necessary and

¹⁸² See Parliamentary Assembly, ‘In brief’, website of the Parliamentary Assembly, <http://website-pace.net/en_GB/web/apce/in-brief>, 13 January 2015.

¹⁸³ Recommendation 582 (1970) on mass communication media and human rights, adopted on 23 January 1970, § 8(a).

¹⁸⁴ Resolution 1003 (1993) on the ethics of journalism, *supra* note 129, § 37.

¹⁸⁵ Recommendation 1277 (1995) on migrants, ethnic minorities and media, adopted on 30 June 1995, § 5(iv) a, d and f.

¹⁸⁶ See, inter alia, Resolution 1510 (2006) on Freedom of Expression and Respect for Religious Beliefs, adopted on 28 June 2006; Recommendation 1804 (2007) on State, religion, secularity and human rights, adopted on 29 June 2007; and Recommendation 1805 (2007) on Blasphemy, religious insults and hate speech against persons on grounds of their religion, adopted on 29 June 2007.

¹⁸⁷ McGonagle, ‘A Survey and Critical Analysis’, *supra* note 94, at 485–486.

¹⁸⁸ Recommendation 1768 (2006) on the image of asylum-seekers, migrants and refugees in the media, § 8(8.4.3); and Resolution 1563 (2007) on Combating anti-Semitism in Europe, § 12(12.1).

¹⁸⁹ Resolution 1577 (2007) Towards Decriminalisation of Defamation, adopted on 4 October 2007, § 17(17.4).

proportionate.¹⁹⁰ However, in spite of these attempts to carefully restrict the applicability of the required penal laws, the Assembly's calls to criminalize 'hate speech' have caused concern. For example, McGonagle has argued that 'in the absence of a clear and authoritative legal definition' of 'hate speech', 'the Member States are likely to determine its scope as they see fit inducing the risk of appointment of prison sentences for 'lesser' forms of impugned conduct'.¹⁹¹

Ministerial Conference on Mass Media Policy

The European Ministerial Conference on Mass Media Policy has been held with regularity since 1985. It entails the participation of the relevant Ministers or their delegates, and aims to 'map out future European media policy, supplemented by action plans for its implementation'.¹⁹² Of special interest here is the 4th Ministerial Conference on 'The Media in a Democratic Society' held in 1994. In the Conference Declaration, the Ministers condemn 'in line with the Vienna Declaration, all forms of expression which incite to racial hatred, xenophobia, anti-Semitism and all forms of intolerance, since they undermine democratic security, cultural cohesion and pluralism'.¹⁹³ Moreover, in the Conference Action Plan, the Ministers call the Committee of Ministers to investigate, in co-operation with media professionals and relevant authorities, the possibility of drafting 'guidelines which could assist media professionals in addressing intolerance in all its forms'.¹⁹⁴ Next, I will analyse how this and the other aforementioned strategies have been interpreted by the Court.

¹⁹⁰ Resolution 1636 (2008) Indicators for media in a democracy, adopted on 3 October 2008, § 8(8.3).

¹⁹¹ McGonagle, 'A Survey and Critical Analysis', *supra* note 94, at 486.

¹⁹² The body responsible of the Conferences preparations and implementation of the action plans is the Council of Europe's Steering Committee on Media and Information Society. The old Steering Committee on Media and New Communication Services was replaced on 1 January 2012. See on this the website of the Steering Committee on the Media and New Communication Services, available at <http://www.coe.int/t/dghl/standardsetting/media/cdmc/default_en.asp>, 4 January 2015.

¹⁹³ Declaration of the 4th Ministerial Conference on Mass Media Policy, Prague, 7–8 December 1994, Strasbourg, 2006, DH-MM (2006) 4, § 7. See also Vienna Declaration, *supra* note 164.

¹⁹⁴ Action Plan of the 4th Ministerial Conference on Mass Media Policy, *supra* note 193, 6. Media and intolerance.

3 Liability for Hate Speech in Practice

The cornerstone of all the Council of Europe's actions is the case-law of the Court, where the rules and standards adopted by the other bodies of the Council are interpreted and enforced most efficiently. Through a line of judgments the Court has adopted a guiding (although not entirely clear) approach towards 'hate speech' and related legal questions. I will begin my analysis of the Court's case-law by discussing the application of the aforementioned abuse of the rights clause, and its relationship with Article 10.

3.1 Relationship between Articles 10 and 17

The Court, and previously the European Commission of Human Rights (hereinafter 'the Commission'), have both relied on Article 17 as well as on the restrictions established in Article 10(2) for declaring inadmissible or defeating complaints involving 'racist, xenophobic, or anti-Semitic speech; statements denying, disputing, minimizing, or condoning Holocaust; and neo-Nazi idea'.¹⁹⁵ Accordingly, when faced with a conflict between words inciting to hatred and freedom of expression, the Court has chosen between two different approaches: 'exclusion' or 'restriction' of the right.¹⁹⁶ The first approach consists of excluding the right to freedom of expression from the protection afforded by Article 10 by applying Article 17 ECHR. The second approach entails full analysis of the legitimacy of the interference with the right protected by Article 10(1) in the meaning of the restriction criteria of Article 10(2), and especially under the 'necessary in a democratic society' test provided for therein.¹⁹⁷ The most significant difference between these two

¹⁹⁵ The current system entailing a single permanent court replaced the earlier system entailing the combination of the Commission and a court, also known as the European Court of Human Rights (hereinafter 'the court'), when Protocol No. 11 came into force. Before, the Commission was the one to decide on admissibility of the applications under Article 35 ECHR. It also established the facts of the cases, conciliated between the parties, and drafted non-binding legal opinions as to whether or not there had been a violation. If the case was later referred to the court, these legal opinions had a central role in the court's analysis. See Harris, O'Boyle & Warbrick, *Law of the European Convention*, *supra* note 3, at 571, 573–575, 652, and 706–708; and Ovey & White, *The European Convention*, 5th Edition, *supra* note 3, at 430. The proceedings before the Court still entail two phases: deciding on admissibility and the judgment on merits. However, today, both of these phases are carried out by the Court. If the application is manifestly inadmissible, it will be dealt with by a single judge giving an inadmissibility decision. In other cases, the application is referred to either a Committee of three judges or a Chamber of seven judges, which will analyse both the admissibility and, if the application is admissible, the merits of the case. See European Court of Human Rights, 'Life of the application', <http://www.echr.coe.int/Documents/Case_processing_ENG.pdf>, 3 January 2015; and European Court of Human Rights, Public Relations Unit, 'Your Application to the ECHR' http://www.echr.coe.int/Documents/Your_Application_ENG.pdf, 3 January 2015, at 6 and 7.

¹⁹⁶ Tulkens, Françoise, 'When to say is to do – Freedom of expression and 'hate speech' in the case-law of the European Court of Human Rights' in Casadevall, Josep; Myjer, Egbert; O'Boyle, Michael; and Austin, Anna (eds.), *Freedom of Expression: Essays in honour of Nicholas Bratza* (Wolf Legal Publishers, Oisterwijk, 2012), 279–295, at 280.

¹⁹⁷ Weber, *Manual on Hate Speech*, *supra* note 105, at 19.

options lies in the conducting of a ‘balancing exercise’. In short, when a case is analysed under Article 10 ECHR, the Court recognizes the existence of the right to freedom of expression and weighs it against the interests set forth in Article 10(2). Such weighting does not take place if the analysis is carried out under Article 17, which allows a type of speech to be excluded from protection based solely on its content.¹⁹⁸ In its case-law, the Court has sought to establish ‘a principal distinction’ between statements inciting to hatred and thus categorically excluded from any protection by Article 17, and statements that may be restricted outside the scope of protection through analysis carried out under Article 10(2). One of the central elements emphasized by the Court in establishing this distinction is the context of the impugned statements. An expression is less likely to be interpreted as a categorically prohibited form of incitement to violence when it occurs in the context of ‘reporting to well-informed audience as part of a pluralistic debate’.¹⁹⁹ However, the Court has not been entirely successful in establishing this distinction, mainly due to the fact that Article 17 has been discussed in fewer cases than Article 10.²⁰⁰

Despite reluctance to directly apply Article 17 ECHR, the Court has also been unwilling to disregard it completely. Therefore, in its case-law, the Court has established an ‘indirect application’ variant, where Article 17 is applied as a ‘principle of interpretation’ in order to assess whether restrictions on freedom of expression are necessary in the meaning of Article 10(2).²⁰¹ In practice, the ‘indirect application’ entails the same consideration of the question of compliance with Article 10 as the regular analysis carried out under said Article. The restriction criteria set forth in Article 10(2) is, however, assessed in the light of Article 17.²⁰² One of the fundamental questions the Court must ask itself when adopting this ‘principle of interpretation’ approach is whether the applicant intended to disseminate racist ideas and opinions through the use of ‘hate speech’. If the answer is positive, then the impugned statements cannot be tolerated in a democratic society and the interference with right to freedom of expression has been necessary. On the contrary, if the applicant – for example, a journalist – was only trying to inform the public on matter of public interest without any racist intention, then the statements (although they might be perceived as shocking or

¹⁹⁸ See Keane, David, ‘Attacking Hate Speech under Article 17 of the European Convention on Human Rights’, 25 *Netherlands Quarterly of Human Rights* 4 (2007), 641–663, at 643 and 661.

¹⁹⁹ Ovey & White, *The European Convention*, 5th Edition, *supra* note 3, at 430.

²⁰⁰ Keller, *European and International Media Law*, *supra* note 102, at 391.

²⁰¹ Weber, *Manual on Hate Speech*, *supra* note 105, at 27. See, *inter alia*, the decision of the Commission in the case of *Kühnen v. Germany*, Application no. 12194/86, 28 May 1986.

²⁰² See among other authorities *Lehideux and Isorni v. France*, *supra* note 114, § 38.

offensive) are protected by Article 10 ECHR and restrictions cannot be regarded as necessary.²⁰³

3.2 Application of Article 17

3.2.1 Recourse to Article 17

The use of Article 17 ECHR has varied considerably over time between direct, indirect and non-existent application.²⁰⁴ Originally, the Commission rarely applied Article 17 and only statements ‘aiming at hypothetical situations of totalitarian doctrine’ were deemed as contrary to the Convention and, therefore, excluded from the protection of Article 10.²⁰⁵ As mentioned above, the Court has preferred the ‘principle of interpretation’ approach, but has not completely abstained from direct application of Article 17 either, occasionally relying on it quite heavily.²⁰⁶ It has, for example, affirmed a special status for Holocaust denial and revisionist speech by stating that there exists a ‘category of clearly established historical facts – such as the Holocaust – whose negation or revision’ is removed from the protection of Article 10 by Article 17.²⁰⁷ The Court took perhaps its most clear-cut stance on such speech in 2003, in the case of *Garaudy v. France*.²⁰⁸ This case concerned the conviction of a publisher of a book that included chapter titles such as ‘The Myth of the Holocaust’. In its argumentation, the Court states that the ‘the denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order’. After concluding that the general tenor of the applicant’s book was ‘markedly revisionist and therefore run counter to the fundamental values of the Convention... namely justice and peace’, the Court found the application to meet the category of aims prohibited by Article 17 ECHR. Thus, it was declared

²⁰³ See *Jersild v. Denmark*, *supra* note 106. See also Weber, *Manual on Hate Speech*, *supra* note 105, at 39.

²⁰⁴ Weber, *Manual on Hate Speech*, *supra* note 105, at 23.

²⁰⁵ See, inter alia, the two inadmissibility decisions: *Communist Party (KPD) v. the Federal Republic of Germany*, Yearbook 1, at 222, decision of 20 July 1957, considering the establishment of ‘the communist social order by means of a proletarian revolution and the dictatorship of the proletariat’, and *Glimmerveen and Hagenbeek v. the Netherlands*, Application nos 8348/78 and 8406/78, decision of 11 October 1979 concerning a political party which promoted the idea that ‘the general interest of a State is best served by an ethnical homogenous population and not by racial mixing’.

²⁰⁶ See the first case where the Court applied Article 17 ECHR, *Lawless v. Ireland (No. 3)*, Application no 332/57, 1 July 1961, The Law, § 7. On ‘hate speech’ cases, see McGonagle, ‘A Survey and Critical Analysis’, *supra* note 94, at 459.

²⁰⁷ See *Lehideux and Isorni v. France*, *supra* note 114, § 47. The case concerned an advertisement published in the national newspaper *Le Monde* as part of a campaign aiming to rehabilitate the memory of General Philippe Pétain. The advertisement was, at the end, regarded as polemical publication, which are entitled to the protection of Article 10 ECHR.

²⁰⁸ *Garaudy v. France*, Application no. 65831/01, decision of 24 June 2003. See for an analysis of the case as an example of ‘indirect enforcement of non-state actor obligations’ Clapham, Andrew, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006), at 409.

inadmissible.²⁰⁹ This decision suggests that the special status of Holocaust denial entails the direct application of Article 17.²¹⁰

In addressing other forms of ‘hate speech’, including racist, xenophobic, and anti-Semitic speech, the Court has mainly relied on the indirect application of Article 17.²¹¹ In the case of *Seurot v. France*, the Court only refers to Article 17 before concluding that the racist-toned publication, written by a teacher and published in a school bulletin, enjoyed protection under Article 10. However, in this case restricting this right was necessary in the meaning of Article 10(2).²¹² Thus, it appears that, unlike revisionist speech, other forms of ‘hate speech’ in principle enjoy protection under Article 10.²¹³ However, the Court’s position on this matter is by no means clear. For example, in its judgment in the case of *Jersild v. Denmark*, the Grand Chamber of the Court states that there is no doubt the racist third-party-statements ‘were more than insulting to members of the targeted groups’ and did not enjoy the protection of Article 10.²¹⁴ In this instance, the Court seems willing to extend the direct application of Article 17 also to such forms of speech that do not entail Holocaust denial. However, in the footnote of the cited sentence, the Court refers to two very different previous judgments.²¹⁵ While the first referred judgment relies on the direct application of Article 17, the second adopts an indirect application of the same. It is unclear to which approach the majority was referring, although it has been argued that the wiser interpretation would be to highlight the reference made to the latter case.²¹⁶

Nonetheless, after *Jersild* the Court has applied Article 17 directly in other cases not regarding Holocaust denial. This was done, for example, in the case of *Pavel Ivanov v. Russia*, where the applicant had alleged that the Jewish were plotting a conspiracy against the Russian people and ‘ascribed fascist ideology to the Jewish leadership’.²¹⁷ In its

²⁰⁹ *Garaudy v. France*, *supra* note 208, § 23.

²¹⁰ See on this Keane, ‘Attacking Hate Speech under Article 17’, *supra* note 198, at 651.

²¹¹ Weber, *Manual on Hate Speech*, *supra* note 105, at 23; and McGonagle, ‘A Survey and Critical Analysis’, *supra* note 94, at 459 and 461.

²¹² *Seurot v. France*, Application no. 57383/00, decision of 18 May 2004. See for an analysis on the case as an example of ‘indirect enforcement of non-state actor obligations’ Clapham, *Human Rights Obligations*, *supra* note 208, at 409.

²¹³ Keane, ‘Attacking Hate Speech under Article 17’, *supra* note 198, at 651.

²¹⁴ *Jersild v. Denmark*, *supra* note 106, § 35. See also *Gündüz v. Turkey*, *supra* note 137, § 41, and Oetheimer, ‘Protecting Freedom of Expression’, *supra* note 139, at 430.

²¹⁵ The 1979 decision in *Glimmerveen and Hagenbeek v. the Netherlands*, *supra* note 205, and 1986 judgment in *Kühnen v Germany*, *supra* note 201.

²¹⁶ Keane, ‘Attacking Hate Speech under Article 17’, *supra* note 198, at 655. The case of *Jersild*, *supra* note 106, was analysed under Article 10 ECHR because it did not concern a violation of the rights of the authors but the rights of the journalist reporting on the authors.

²¹⁷ *Pavel Ivanov v. Russia*, Application no. 35222/04, decision of 20 February 2007.

judgement, the Court concludes that ‘such a general and vehement attack on one ethnic group is in contradiction with the Convention’s underlying values notably tolerance, social peace and non-discrimination’. Hence, the applicant could not benefit from the protection afforded by Article 10.²¹⁸ A similar conclusion was reached in the case of *Norwood v. the United Kingdom*, which had no connection to anti-Semitic thoughts but concerned, instead, the conviction of the applicant for displaying a contra-Islam poster in his window.²¹⁹ This application was also declared inadmissible.²²⁰ Moreover, although Article 17 was not directly applied in the case of *Leroy v. France*, in its judgment to this case the Court implies that the scope of said Article covers ‘racism, anti-Semitism and Islamophobia’.²²¹ Consequently, in the light of the Court’s case-law, it seems that nowadays Article 17 is directly applicable to more general cases of racial and religious discrimination, and not only to clear cases of Holocaust denial.²²²

3.2.2 Critique of guillotine clause

While some academic commentators refer to the ‘potential’ of Article 17 ECHR, others regard its application to pose problems.²²³ Some even strongly suggest that the Court should abstain from applying Article 17 altogether, both ‘directly’ and ‘indirectly’.²²⁴ Those against at least the ‘direct’ application of Article 17 are mainly troubled by its ‘guillotine effect’. This term refers to Article 17’s aforementioned power to categorically exclude certain forms of expression from the protection of Article 10.²²⁵ Moreover, it has been claimed that in cases where the Court applies Article 17 directly, it relies too strongly on the assessment of the domestic authorities making also the content examination superficial.²²⁶ These radical effects have led some commentators to favour the ‘indirect’ application variant.²²⁷

²¹⁸ *Ibid*, THE LAW, § 1.

²¹⁹ *Norwood v. the United Kingdom*, *supra* note 149, THE FACTS, A. The circumstances of the case. See also Part I, Section 1.3 Definition of Hate Speech.

²²⁰ *Ibid*, THE LAW.

²²¹ *Leroy v. France*, Application no. 36109/03, 2 October 2008, § 27.

²²² Cannie & Voorhoof, ‘The Abuse Clause and Freedom of Expression’, *supra* note 104, at 63.

²²³ On ‘potential’, see Weber, *Manual on Hate Speech*, *supra* note 105. On the opposite approach see, *inter alia*, Keane, ‘Attacking Hate Speech under Article 17’, *supra* note 198; McGonagle, ‘A Survey and Critical Analysis’, *supra* note 94; and Tulkens, ‘When to say is to do’, *supra* note 196.

²²⁴ Cannie & Voorhoof, ‘The Abuse Clause and Freedom of Expression’, *supra* note 104.

²²⁵ *Ibid*, at 58; and Van Drooghenbroeck, ‘L’Article 17 de la Convention Européenne’, *supra* note 103, at 563–564.

²²⁶ Cannie & Voorhoof, ‘The Abuse Clause and Freedom of Expression’, *supra* note 104, at 67.

²²⁷ Tulkens, ‘When to say is to do’, *supra* note 196, at 284–285.

On the other hand, it has been argued that there actually exists little difference between the ‘direct’ and ‘indirect’ application of Article 17.²²⁸ This is allegedly due to the Strasbourg organs’ willingness to heavily rely on the national authorities’ assessment when applying Article 10. This follows from the fact that according to the Court’s case-law, the domestic authorities enjoy a wider ‘margin of appreciation’ when assessing the necessity of an interference in ‘hate speech’ cases.²²⁹ Hannes Cannie and Dirk Voorhoof have pointed out that, when applied together with Article 17, this wider ‘margin of appreciation’ – considerably restricting the Court’s supervision power and the need for the domestic authorities to ‘pertinently and sufficiently’ justify the interferences – might trigger a weighty application of the abuse clause.²³⁰ Hence, also when relying on the ‘indirect’ application of Article 17, the Court’s analysis risks becoming categorically distorted since the strict requirements of proof following from Article 10(2) are made ‘redundant’. The worst-case scenario is that certain Member States take advantage of this in order to ‘restrict or prohibit with impunity the expression of unpopular views by those who do not espouse mainstream liberal positions’. This outcome would clearly be inconsistent with the aims of Article 10 ECHR. For these reasons, the most extreme critics of Article 17 stress that it should not be applied at all.²³¹

3.3 Application of Article 10

3.3.1 Restricting different types of hate speech

As already mentioned, the majority of ‘hate speech’ cases have been judged under Article 10 ECHR.²³² For example Perry Keller has stated that even when not adopted in connection to Article 17, Article 10 has afforded the Court ‘ample grounds’ to approve restrictions adopted at domestic level against expressions inciting hatred. With regard to different types of ‘hate speech’, the Court has stated, first of all, that Article 10 protection can be restricted concerning incitement to religious hatred or intolerance, including ‘gratuitously offensive attacks on matter regarded as sacred by believers’. Such statement was made, for example,

²²⁸ Cannie & Voorhoof, ‘The Abuse Clause and Freedom of Expression’, *supra* note 104, at 58.

²²⁹ See among other authorities *Lindon, Otchakovsky-Laurens and July v. France*, Application nos 21279/02 and 36448/02, [GC] 22 October 2007.

²³⁰ Cannie & Voorhoof, ‘The Abuse Clause and Freedom of Expression’, *supra* note 104, at 72.

²³¹ Hare, Ivan, ‘Extreme Speech under International and Regional Human Rights Standards’ in Hare, Ivan and Weinstein, James (eds.), *‘Extreme Speech and Democracy’* (Oxford University Press Inc., 2009), 62–80, at 68–71 and 79.

²³² See among other authorities *Soulas and Others v. France*, Application no. 15948/03, 7 October 2008. See also *Balsytė-Lideikienė v. Lithuania*, Application no. 72596/01, 4 November 2008; and *Jan-Marie Le Pen v. France*, Application no. 18788/09, 20 April 2010.

with regard to the case of *Gündüz v. Turkey*, which concerned statements made by a religious leader during a TV debate.²³³ Moreover, the Court has had an opportunity to address issues regarding the ‘glorification of terrorism’. The aforementioned case of *Leroy v. France* relating to the conviction of a cartoonist for his drawings published in a Basque weekly newspaper representing the attacks of 11 September 2001 with a caption stating ‘We have all dreamt of it... Hamas did it’ was the first of this kind. Although in *Leroy* the Court refers to Article 17 ECHR, it conducts the analysis of the case purely under Article 10(2) finding no violation of Article 10(1).

In addition, the Court has considered under Article 10 cases of anti-constitutional or anti-national hatred. Such was the situation, inter alia, in the aforementioned case of *Sürek v. Turkey (No. 1)*.²³⁴ Recently, the Court also had an opportunity to deal with sexual orientation influenced ‘hate speech’. The case of *Vejdeland and Others v. Sweden* considered the distribution of pamphlets containing homophobic statements to the lockers of high school students.²³⁵ The Court concluded that inciting to hatred does not always entail a call for an act of violence. It stated as follows:

*‘Attack on persons committed by insulting or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner.’*²³⁶

Finally, as mentioned above, the Court has also dealt with negationism cases under Article 10.²³⁷ However, most such cases and cases concerning outright Holocaust denial have been declared categorically inadmissible under Article 17 ECHR. This has influenced authors to conclude that a higher standard of protection is guaranteed against Holocaust denial than against other forms of ‘hate speech’.²³⁸

²³³ Keller, *European and International Media Law*, *supra* note 102, at 392. See the cases of *Wingrove v. the United Kingdom*, Application no. 15615/07, decision of July 2009 and *Gündüz v. Turkey*, *supra* note 137.

²³⁴ See Part I, Section 1.3 Definition of Hate Speech. See also in the following in Part I, Section 3.4.2 Media’s liability for opinions of others.

²³⁵ *Vejdeland and Others v. Sweden*, Application no. 1813/07, 9 February 2012.

²³⁶ *Ibid*, § 55.

²³⁷ The aforementioned case of *Lehideux and Isorni*, *supra* note 114, considering the revision of Philippe Pétain’s conviction is one example.

²³⁸ Keane, ‘Attacking Hate Speech under Article 17’, *supra* note 198, at 662.

3.3.2 *Content and context*

When applying Article 10 ECHR, one of the tests the Court must carry out is the aforementioned ‘necessity test’. When conducting this test the Court plays attention not only to the content of the allegedly impugned statements but also to the context in which they were made public. Context is crucial for the Court’s case-by-case analysis also in regard to the analysis of the proportionality of an interference.²³⁹ Therefore, when adopting Article 10 analysis, the Court attempts to identify, first of all, the applicant’s intention. Was he or she seeking to inform the public about a matter of general interest?²⁴⁰ If this has been the case, the Court concludes that the respective interference with the applicant’s right was not ‘necessary in a democratic society’. In contrast, if the remarks were specifically meant to incite to violence or hatred, the national authorities’ ‘margin of appreciation’ is wider and the Court is more likely to accept restrictions.²⁴¹

When considering the intent of the applicant, the Court takes into account the following facts: the applicant’s function or role in the society; the form of speech; and the impact it had. It usually starts its assessment with the applicant. As in other freedom of expression cases, also with regard to ‘hate speech’, special protection is afforded to politicians and members of the media. Consequently, if the applicant belongs to either of these groups, the domestic authorities’ ‘margin of appreciation’ is more restricted. Next, the Court analyses the medium used and the form of speech. This is vital as they have a direct effect on the impact of the message.²⁴² For example, greater protection has been afforded to artistic forms of speech such as poetry or fictive literature.²⁴³ Memoirs and periodicals with limited distribution have also been afforded similar protection.²⁴⁴ Even when the statements are distributed by mass media, the Court has taken into account the circumstances of the relevant case and, for example, whether the author of the statement has had the opportunity to

²³⁹ Oetheimer, ‘Protecting Freedom of Expression’, *supra* note 139, at 439. See on the ‘principle of proportionality in Part I, Section 1.2, Freedom of Expression in Practice, Classic case of Handyside.

²⁴⁰ *Gündüz v. Turkey*, *supra* note 137, § 44.

²⁴¹ *Ibid*, § 61.

²⁴² Keane, ‘Attacking Hate Speech under Article 17’, *supra* note 198, at 440.

²⁴³ See the cases of *Karataş v. Turkey*, Application no. 23168/94, [GC] 8 July 1999; and *Alinak v. Turkey*, Application no. 40287/98, 29 March 2005. See also Keane, *supra* note 198, at 440.

²⁴⁴ See the cases of *Başkaya and Okçuoğlu v. Turkey*, Application nos 23536/94 and 24408/94, [GC] 8 July 1999; and *Kızılyaprak v. Turkey*, Application no. 27528/95, 2 October 2003. On the contrary, in the aforementioned case of *Leroy*, *supra* note 221, the Court concluded that despite the limited distribution of the review, due to the sensitive situation at the relevant area the cartoons had caused a public reaction capable of stirring up violence.

rephrase them. Accordingly, in the case of *Gündüz v. Turkey*, protection was afforded to statements made during a heated TV debate.²⁴⁵

With this regard, it should be noted that the Court has not been completely unanimous in emphasizing context when analysing the necessity of restrictions. Whilst some judges have been reluctant to afford the context as much significance as the majority, others have demonstrated willingness to put even greater weight on it.²⁴⁶ The latter have suggested the application of the so-called ‘clear and present danger’ test, adopted in the US Constitutional jurisprudence.²⁴⁷ This idea was first introduced in the partly dissenting opinion of Judge Bonello in the case of *Sürek (No. 1)*.²⁴⁸ Although this view was not adopted by the majority in said case, a clear reference to it was made later in the case of *Erbakan v. Turkey*, which concerned the conviction of politician for a public speech that had been given more than four years before the criminal charges against the applicant were brought.²⁴⁹ The Court concluded that the interference with the applicant’s right could not be regarded as necessary due to the fact that at the time of the prosecution there existed no ‘actual risk’ or ‘imminent danger’ for the society.²⁵⁰ However, the Court’s current stand on this approach remains somewhat unclear. Although it has been referred to in several opinions by the members of the Court, it has not been discussed by the majority since the case of *Kiliç and Eren v. Turkey* in 2011.²⁵¹ This case concerned the conviction of the two applicants for shouting slogans in support of the Kurdistan Workers’ Party. The Court came to the conclusion that since the applicants had not caused clear and imminent danger there had been a violation of their Article 10 rights.²⁵²

²⁴⁵ *Gündüz v. Turkey*, *supra* note 137.

²⁴⁶ See dissenting opinions, inter alia, in the cases of *Sürek v. Turkey (No.1)*, *supra* note 142; and *Jersild v. Denmark*, *supra* note 106.

²⁴⁷ Keane, ‘Attacking Hate Speech under Article 17’, *supra* note 198, at 441. See also in Introduction, Section 2.2.1 Approach to hate speech.

²⁴⁸ See also the partly dissenting opinion of Judge Palm and the joint partly dissenting opinion of Judges Tulkens, Casadevall, and Greve.

²⁴⁹ *Erbakan v. Turkey*, Application no. 59405/00, 6 July 2006. The Court found a violation of Article 10.

²⁵⁰ *Ibid.*, § 68.

²⁵¹ *Kiliç and Eren v. Turkey*, Application no. 43807/07, 29 November 2011. See on the opinions of individual Judges, inter alia, the joint concurring opinion by Judges Pinto de Albuquerque and Dedov in the case of *Taranenko v. Russia*, Application no. 19554/05, 15 May 2014, § 7; joint partly dissenting opinion of Judges Vučinić and Pinto de Albuquerque in the case of *Perinçek v. Switzerland*, Application no. 27510/08, 17 December 2013, § 15; and the concurring opinion of Judge Pinto de Albuquerque in the case of *Ahmet Yildirim v. Turkey*, Application no. 3111/10, 18 December 2012. See also Oetheimer, ‘Protecting Freedom of Expression’, *supra* note 139, at 442.

²⁵² *Kiliç and Eren v. Turkey*, *supra* note 251, § 29.

Finally, as mentioned previously, the assessment of context is crucial also for the analysis of the proportionality of interference.²⁵³ Even if there exists no question as to the ‘hate speech’ nature of the comments, the Court might still find a breach of Article 10 ECHR if it concludes that the interference by the domestic authorities has been excessive. The Court has adopted a very strict approach, for example, with regard to preventive measures. It has stressed that due to the seriousness of a preventive interference, it is accepted only in very specific circumstances, and always requires the highest level of scrutiny by the Court.²⁵⁴ Additionally, the Court practises particularly strict scrutiny in connection to criminal sanctions. However, the Court has accepted criminal sentences in the context of ‘hate speech’ provided that they are not being used in an excessive manner.²⁵⁵ For example, in its judgment concerning the case of *Gündüz*, the Court first recognized the severity of the sentence, which entailed four years of imprisonment, but then continued by noting that provisions for deterrent penalties might be necessary in certain democratic societies.²⁵⁶

3.4 Media’s Liability and Hate Speech

3.4.1 Conviction of journalists

As demonstrated above, in the case-law of the Court the press has been afforded special protection.²⁵⁷ However, the Court has also stated that members of the press are not immune to sanctions and may even face a prison sentence for press-related offences, although such a severe penalty must remain an exception.²⁵⁸ Accordingly, in all cases including journalists, their enhanced protection must be carefully balanced with their responsibilities and analysed in light of the circumstances of the case in question.

An important case in this context is the case of *Cumpănă and Mazăre v. Romania*, which concerned the conviction of two journalists for publishing a defamatory newspaper article and a cartoon.²⁵⁹ The applicants were sentenced to seven months’ imprisonment, denied

²⁵³ The analysis of the ‘prescribed by law’ criterion has been discussed above. See Part I, Section 1.2 Freedom of Expression in Practice, Classic case of *Handyside*.

²⁵⁴ See, among other authorities, *Dicle v. Turkey*, Application no. 34685/97, 10 November 2004; *Éditions Plon v. France*, Application no. 58148/00, 18 May 2004; and *Ahmet Yildirim v. Turkey*, *supra* note 251, §§ 47 and 52.

²⁵⁵ Oetheimer, ‘Protecting Freedom of Expression’, *supra* note 139, at 443.

²⁵⁶ *Gündüz v. Turkey*, *supra* note 137, § 40.

²⁵⁷ See in Part I, Section 1.2 Freedom of Expression in Practice, Special protection afforded to media.

²⁵⁸ See European Court of Human Rights, Research Division, ‘Internet: Case-law of the European Court of Human Rights’, December 2011, <http://www.echr.coe.int/Documents/Research_report_internet_ENG.pdf>, 4 January 2015, at 13.

²⁵⁹ *Cumpănă and Mazăre v. Romania*, Application no. 33348/96, [GC] 17 December 2004.

certain civil rights, and prohibited from working as journalists for one year.²⁶⁰ In its analysis of the case, the Grand Chamber states the following:

*‘Imprisonment is a necessary and proportionate penalty for media subject to serious violations of other fundamental rights through defamatory or insulting statements, such as “hate speech”’.*²⁶¹

Nonetheless, because this was a civil case, imprisonment was deemed a disproportionate interference with the applicants’ rights. In fact, since this ruling the Court and the other bodies of the Council have sought to abolish the possibility of prison sentences for journalists in defamation cases from the Member States’ legislations.²⁶²

However, as suggested by the Court’s quoted statement in *Cumpănă and Mazăre*, in ‘hate speech’ related cases it has been more willing to accept even prison sentences. For example, in its judgment in the case of *Mehmet Cevher Ilhan v. Turkey*, the Court found that the restriction of journalist’s freedom of expression – for writing an article expressing hatred against women who refuse to use a veil – had been necessary.²⁶³ Importantly, it did not oppose the imposition of a prison sentence as such, but concluded that in this particular case the sanction of over two years of imprisonment was disproportionate due to its length.²⁶⁴ Accordingly, it seems that in principle even journalists risk imprisonment in cases where they themselves are the authors of ‘hate speech’ content.

3.4.2 Media’s liability for opinions of others

The most central case concerning the classical media’s liability for ‘hate speech’ originated by a third party is the aforementioned case of *Jersild v. Denmark*.²⁶⁵ As mentioned previously, in this case the Court first concluded that the statements of the group interviewed by the applicant were more than insulting, and did not enjoy the protection of Article 10.²⁶⁶

²⁶⁰ European Court of Human Right, Registrar, ‘Grand Chamber judgment in the case of *Cumpănă and Mazăre v. Romania*’, Press release, 17 December 2004,

<[²⁶¹ *Cumpănă and Mazăre v. Romania*, *supra* note 259, § 115.](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{‘itemid’: [‘003-12208691269342’]}>”, 4 January 2015.</p></div><div data-bbox=)

²⁶² For the Court’s case-law see, inter alia, *Bodrozic and Vujin v. Serbia*, Application no. 38435/05, 23 June 2009, § 39; and *Azevedo v. Portugal*, Application no. 20620/04, 27 March 2008, § 33. For other instruments see, inter alia, Declaration on freedom of political debate in the media, adopted on 12 February 2004 at the 872nd meeting of the Ministers’ Deputies; and Parliamentary Assembly’s Resolution 1577 (2007) Towards Decriminalisation of Defamation, *supra* note 189.

²⁶³ *Mehmet Cevher Ilhan v. Turkey*, Application no. 15719/03, 13 January 2009.

²⁶⁴ *Ibid.*, §§ 36, 42 and 45.

²⁶⁵ *Jersild v. Denmark*, *supra* note 106.

²⁶⁶ *Ibid.*, § 35.

However, according to the Court a significant feature of this case was that ‘the applicant did not make the objectionable statements himself’ but only assisted in their dissemination in his capacity as a television journalist.²⁶⁷ Taking this into account, the Court concluded that as the applicant’s aim had been to expose aspects of a matter of public concern rather than to propagate ‘racist views and ideas’, there had been a breach of his Article 10 rights.²⁶⁸ Hence, in this case, the Court drew a line in applying ‘hate speech’ legislation to individuals purely ‘reporting the views of racists for a non-racist purpose’.²⁶⁹ This position is summarized well in the following statement by the Court:

*‘The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so’.*²⁷⁰

On the other hand, in the aforementioned case of *Süreş (No. 1)* the Court did not give similar weight to this distinction.²⁷¹ It concluded that ‘while it is true that the applicant did not personally associate himself with the views contained in the impugned letters, he nevertheless provided their writers with an outlet for stirring up violence and hatred’.²⁷² The Court highlighted that as the owner of the review, the applicant possessed ‘the power to shape the editorial direction of the review’. For this reason, the Court found that the applicant was ‘vicariously subject’ to the duties and responsibilities of the press, which assume a greater importance in situations of conflict and tension than in typical situations.²⁷³ At first glance it, therefore, seems that the tense security situation in Southeast Turkey at the time of the events distinguishes this case from that of *Jersild*.²⁷⁴ It should be noted, however, that the Grand Chamber ruled on the case of *Süreş (No. 1)* on the same day as on twelve other cases against Turkey, four of which were brought by the same applicant.²⁷⁵ For example, the

²⁶⁷ *Ibid*, § 31. See also Weber, *Manual on Hate Speech*, *supra* note 105, at 37.

²⁶⁸ *Jersild v. Denmark*, *supra* note 106, § 33. See also Weber, *Manual on Hate Speech*, *supra* note 105, at 39–40.

²⁶⁹ *Jersild v. Denmark*, *supra* note 106, § 35.

²⁷⁰ Wintemute, Robert, ‘Blasphemy and Incitement to Hatred under the European Convention: Case Notes’, 6 *The King’s College Law Journal* (1995–1996), 143–146, at 144.

²⁷¹ *Süreş v. Turkey (No.1)*, *supra* note 142, See in Part I, Section 1.3 Definition of Hate Speech.

²⁷² *Süreş v. Turkey (No.1)*, *supra* note 142, § 63. See also *Halis Doğan v. Turkey (No. 3)*, Application no. 4119/02, 10 October 2006, § 36.

²⁷³ *Süreş v. Turkey (No. 1)*, *supra* note 142, § 63.

²⁷⁴ *Jersild v. Denmark*, *supra* note 106.

²⁷⁵ *Süreş and Özdemir v. Turkey*, *supra* note 142; *Süreş v. Turkey (No. 2)*, Application no. 24122/94, [GC] 8 July 1999; and *Süreş v. Turkey (No. 4)*, Application no. 24762/94, [GC] 8 July 1999. No violations were found

case of *Sürek and Özdemir v. Turkey* involved the conviction of the major shareholder and the editor-in-chief of a newspaper that had published interviews with the leader of the Kurdistan Workers' Party. In connection to this case, the Court stated that 'the interviews had a news-worthy content which allowed the public both to have an insight into the psychology of those who are driving force behind the opposition to official policy in Southeast Turkey and to assess the stakes involved in the conflict'. Thus, the interviews could not be considered to 'incite to violence or hatred' and interference with the applicants' right had not been necessary.²⁷⁶

These judgments illustrate the Court's case-by-case approach well. Moreover, disparate rulings and the large number of dissenting opinions published in connection to these cases demonstrate the difficulties inherent to such analysis. Nonetheless, in the light of the aforementioned, it seems that the Court has managed to establish two central factors of which analysis justifies the disparate judgments in these printed media cases: (i) the amount of 'editorial control' and (ii) the intent of the journalist.

in cases *Sürek v. Turkey (No. 1)*, *supra* note 142; and *Sürek v. Turkey (No. 3)*, Application no. 24735/94, [GC] 8 July 1999.

²⁷⁶ *Sürek and Özdemir v. Turkey*, *supra* note 142, § 61. See with this regard also the case of *Erdoğan and İnce v. Turkey*, *supra* note 120, regarding publication of an interview and the following conviction of a journalist and the editor of the relevant review. Also in this case the interview was claimed to have disseminated propaganda against the indivisibility of the state. In this case the Court, however, concluded that although special caution is required when the question is of the publication of views of an organization that resorts to violence against the State, such views cannot be categorized. Accordingly, the national authorities cannot restrict the 'right of the public to be informed' of these views by 'bringing the weight of the criminal law to bear on the media'. The Court thus concluded that there had been a violation of Article 10.

4 Observations on Established Rules and Principles

To summarize Part I of my research, I will provide some observations regarding the Council of Europe's approach towards the classic forms of 'hate speech' and media liability. Firstly, although I admire the pro-freedom of expression approach adopted in the United States, I concur with the Council of Europe and its attempt to counter 'hate speech'. If carried out the right way, suppression of 'hate speech' does not suppress freedom of expression.²⁷⁷ In this context, it is regrettable that the Council has not adopted legally binding and enforceable regulation concerning this approach. Although I welcome the numerous standard-setting text adopted by the different Council bodies and recognize their importance in taking forward the discussion, I feel that at least a legally binding definition of 'hate speech' is required. Existence of such a definition is crucial if the aim is to continue restricting and even completely excluding 'hate speech' from the protection of Article 10.²⁷⁸ As stated by McGonagle, the definition would ideally be provided by an international, legally binding treaty or related adjudicative authority, such as the Court's case-law.²⁷⁹ Personally, I think the definition given in the Committee of Ministers' Recommendation on 'hate speech' could serve this purpose as this definition has previously been accepted by both the Court and the Council bodies representing all the Member States.

Secondly, and regardless of whether there exists a legally binding definition of the key notion, I agree with critics of the so-called 'guillotine clause'. In my view, the application of Article 17 ECHR jeopardizes freedom of speech by preventing certain types of speech from being analysed by the Court. As a result, the Court is unable to take into account the special circumstances of each case. For example, in the case of *Jersild*, the application of Article 17 would likely have led to the Court finding no violation of the journalist's Convention rights even if the 'hate speech' comments were made by third parties and the journalist's intent was to report a matter of public concern.²⁸⁰ In my view, this contradicts the inherent principles of Article 10. Moreover, I find the critics' fear of malpractice by the authorities,

²⁷⁷ From the fact that the Council and the US authorities have adopted a different view concerning 'hate speech', it follows that the Court should be cautious when applying principles adopted in the United States' legal praxis with this regard. Thus, although I feel that so far the Court's majority judgments applying the so-called 'imminent danger' test have been successful, it should remember that this test is heavily rooted in the US concept of freedom of speech and its application to all 'hate speech' cases does not work well in the European framework. *Erbakan v. Turkey*, *supra* note 249; and *Kiliç and Eren v. Turkey*, *supra* note 252. See under Part I, Section 3.3.2 Content and context.

²⁷⁸ See also Oetheimer, 'Protecting Freedom of Expression', *supra* note 139, at 429.

²⁷⁹ *Ibid.*, at 457.

²⁸⁰ *Jersild v. Denmark*, *supra* note 108.

particularly during difficult times and against unpopular views, to be well founded.²⁸¹ In addition, I believe that all these risks posed by the application of Article 17 could, without any difficulties or significant impact on the final outcome, be adjudicated within the ‘speech-protective framework’ of Article 10 by applying its ‘necessity test’.²⁸² This would be in line with the significance given to the assessment of context in binding case-law of the Court. Therefore, I think the Court should refrain from applying the ‘guillotine clause’ in the future.

Thirdly, I approve of the special protection afforded to the media under Article 10. I agree with the Council bodies and the Court’s finding that this protection is a vital element of a truly democratic society. However, this special status is rightly coupled with special responsibilities. In the Court’s case-law this has been demonstrated by the imposition of liability on the press even concerning third party authored content. As mentioned previously, in these liability decisions, the Court has placed considerable weight on the intent of the journalist. For example, in the case of *Jersild*, the lack of intent to spread racist views led to the protection of the journalist’s work by Article 10.²⁸³ On the other hand, it seems that the Court has also emphasised the amount of ‘editorial control’ practiced. The absence of such control led to the finding of a breach of Article 10 in the case of *Gündüz*, whereas in the case of *Sürek (No.1)*, the opposite circumstances justified the Court’s finding of no violation.²⁸⁴ Accordingly, despite their different approaches to freedom of speech, in this context the Council of Europe’s and the US courts’ practices concerning the liability of the traditional media seem surprisingly similar.²⁸⁵ Consequently, I consider it likely that also in Europe this approach is not applied as straightforwardly with regard to ICTs.²⁸⁶ This is due to the fact that the application of this approach to printed media cases is relatively simple because the publisher with the actual ‘editorial control’ can usually be easily identified. However, the same does not always apply with regard to ICTs. It is interesting to see, how this challenge has been overcome by the Council.

²⁸¹ McGonagle, ‘A Survey and Critical Analysis’, *supra* note 94, at 486.

²⁸² See Cannie & Voorhoof, ‘The Abuse Clause and Freedom of Expression’, *supra* note 104, at 76.

²⁸³ *Jersild v. Denmark*, *supra* note 106.

²⁸⁴ *Gündüz v. Turkey*, *supra* note 137; and *Sürek v. Turkey (No.1)*, *supra* note 142.

²⁸⁵ See in Introduction, Section 2.2.2 Approach to liability for user misuse, Traditional media.

²⁸⁶ See on the US approach, Introduction, Section 2.2.2.3 Emergence of case-law.

PART II: COUNCIL OF EUROPE AND INTERNET

1 Cyberspace Challenges

1.1 Court and Unique Features of Internet

To date, the Court has dealt with only a few cases involving issues of online freedom of expression, and its case-law concerning the Internet continues to evolve. However, the Court has already acknowledged that special measures may have to be adopted (and applied alongside the principles originally established for traditional media) in response to the unique features of the Internet. The first influential case to be mentioned in this connection is the case of *Times Newspapers Ltd (Nos 1 and 2) v. the United Kingdom*, which concerned the storing of a defamatory newspaper article in a publicly accessible online archive.²⁸⁷ In this case, the Court noted for the first time that the ‘accessibility’ of the Internet and its ‘capacity to store and communicate vast amounts of information’ make it an important tool ‘in enhancing the public’s access to news and facilitating the dissemination of information generally’.²⁸⁸ I will return to this case later.²⁸⁹

The participatory dimension inherent to online speech was first recognized by the Court in the case of *Ahmet Yildirim v. Turkey*.²⁹⁰ This case concerned the blocking of the Google Sites in Turkey because one webpage uploaded in the service was deemed to entail impugned material. In its analysis, the Court states that ‘the Internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest’.²⁹¹ The Court concluded that the act of blocking a group of websites amounted to collateral and prior censorship. After noting that, according to the principles established regarding classical media, prior censorship of publications requires the highest level of scrutiny by the Court and can rarely be accepted, the Court found a violation of Article 10.²⁹²

²⁸⁷ *Times Newspapers Ltd (Nos 1 and 2) v. the United Kingdom*, Application nos 23676/02 and 3002/03, 11 October 2005.

²⁸⁸ *Ibid.*, § 27.

²⁸⁹ The case will be discussed more in detail in Part II, Section 3.3.1 Journalists writing online.

²⁹⁰ *Ahmet Yildirim v. Turkey*, *supra* note 251. See also McGonagle, ‘User Generated Content’, *supra* note 124, at 16–17.

²⁹¹ *Ahmet Yildirim v. Turkey*, *supra* note 251, § 54.

²⁹² *Ibid.*, §§ 47 and 52. See on this Part I, Section 3.3.2 Content and context.

Moreover, in the case of *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, the Court explicitly compared the status of the Internet to that of the traditional press.²⁹³ The case concerned the reprinting of a defamatory letter acquired from the Internet in a newspaper.²⁹⁴ The Court started by recognizing the fact that the Internet has features that clearly distinguish it from the traditional press, in particular its capacity to store and transmit information. The Court acknowledged that due to these features, wrongful content posted online can cause more harm to the enjoyment of individuals' rights than content published in the printed media. Following from this, the Court concluded that 'policies governing reproduction of material from the printed media and the Internet may differ' and the latter have to be adjusted according to specific features of this technology.²⁹⁵

Finally, in the case of *Mouvement Raëlien Suisse v. Switzerland*, the Court took note of the Internet's capacity to multiply the impact of the information it stores.²⁹⁶ This case concerned a poster campaign entailing a link to a website, where an association behind the campaign endorsed criminal offences. In its judgement, the Court stresses that mere references to harmful Internet sources in public places can have a large negative impact on, for example, public morals. Accordingly, the Court found no violation of Article 10 by the respondent State, which had prohibited the publication of the campaign.²⁹⁷

1.2 Additional Challenge: American safe haven

As demonstrated above, the US approach towards 'hate speech' differs radically from that of the Council of Europe.²⁹⁸ The First Amendment of the US Constitution offers considerably wider protection to those posting hateful online content.²⁹⁹ However, the Internet makes information accessible globally. If an individual or a business disagrees with the rules in one country, operations can easily be moved to a more lenient jurisdiction without closing the website in the State of origin.³⁰⁰ Consequently, European legislative efforts to control 'hate speech' are limited by the inability of the European countries' to gain jurisdiction over US based operators posting or permitting the posting of 'cyber hate'.³⁰¹

²⁹³ *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, Application no. 33014/05, 5 May 2011.

²⁹⁴ The case will be discussed more in detail in Part II, Section 3.3.2 Liability for user-generated content.

²⁹⁵ *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, *supra* note 293, § 63.

²⁹⁶ *Mouvement Raëlien Suisse v. Switzerland*, *supra* note 126.

²⁹⁷ See 'Internet: Case-law of the European Court of Human Rights', *supra* note 258, at 14.

²⁹⁸ See in Part I, Chapter 4 Observations on Established Rules and Principles.

²⁹⁹ Banks, 'European Regulation of Cross-Border Hate Speech', *supra* note 29, at 5. See under Introduction, Section 2.2.1 Approach to hate speech.

³⁰⁰ Van Blarcum, "'Internet Hate Speech'", *supra* note 20, at 783.

³⁰¹ Siegel, 'Hate Speech, Civil Rights, and the Internet', *supra* note 30, at 393.

Today, online hate-mongers shelter themselves from legal liability by situating their operations in the United States.³⁰² Perhaps the most well-known example of this problem is the case of *Yahoo! Inc.*, initially judged in France.³⁰³ In this case the plaintiffs, student unions *la Ligue Contre le Racisme et l'Antisemitisme* (LICRA) and *Union des Etudiants Juifs de France* (UEJF), brought a claim against Internet operator Yahoo! because it had allowed the sale of Nazi memorabilia through its online auction site.³⁰⁴ After consulting several experts, the French court issued an interim decision according to which Yahoo! should filter the material on its French site, preventing French users from accessing material prohibited by French law.³⁰⁵

Dissatisfied with this decision, Yahoo! successfully filed a motion for declaratory judgment in the United States in order to prohibit the enforcement of the French order.³⁰⁶ In its judgment, the District Court concludes that it cannot 'enforce a foreign order that violates the protections of the United States Constitution' by chilling protected speech that occurs simultaneously inside the United States.³⁰⁷ On appeal, the United States Court of Appeals ruled that there was an insufficient amount of contact between the United States and the applicants, LICRA and UEJF, and, therefore, the court lacked jurisdiction.³⁰⁸ This case demonstrates well the problems inherent to the enforcement of European standards concerning the Internet. However, following the declaratory judgment of the Court of Appeals, Yahoo! announced that it would voluntarily ban all auctions of Nazi memorabilia through its site.³⁰⁹ This implies that actions such as mobilizing relevant stakeholders to take self-regulatory measures to tackle 'hate speech' may prove an effective alternative method

³⁰² See Fraser, David, "On the Internet, Nobody Knows you're a Nazi": Some Comparative Legal Aspect of Holocaust Denial on the WWW' in Hare, Ivan and Weinstein, James (eds) *Extreme Speech and Democracy* (Oxford University Press Inc., 2009), 511–537, at 514.

³⁰³ Tribunal de Grande Instance de Paris, *la Ligue Contre le Racisme et L'Antisemitisme et L'Union des Etudiants Juifs de France c. La Société YAHOO! INC. et La Société YAHOO! France*, RG:00/05308, 22 May 2000.

³⁰⁴ Fraser, "On the Internet, Nobody Knows you're a Nazi", *supra* note 302, at 522, and Banks, 'European Regulation of Cross-Border Hate Speech', *supra* note 29, at 5.

³⁰⁵ Tribunal de Grande Instance de Paris, *Ordonnance de Référé*, 22 May 2000; 11 August 2000; and 20 November 2000. See also Banks, 'European Regulation of Cross-Border Hate Speech', *supra* note 29, at 6.

³⁰⁶ Banks, 'European Regulation of Cross-Border Hate Speech', *supra* note 29, at 6; and Van Blaricum, "Internet Hate Speech", *supra* note 20, at 805.

³⁰⁷ *Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 169 F. Supp 1181 (N.D. Cal. 2001), 7 November 2001. See also Banks, 'European Regulation of Cross-Border Hate Speech', *supra* note 29, at 6; and Van Blaricum, "Internet Hate Speech", *supra* note 20, at 805.

³⁰⁸ *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 379 F. 3d 1120 (9th Cir. 2004), 23 August 2004. See Van Blaricum, "Internet Hate Speech", *supra* note 20, at 806 and 807.

³⁰⁹ Van Blaricum, "Internet Hate Speech", *supra* note 20, at 825.

of controlling cross Atlantic ‘cyber hate’ when legal attempts to do so fail. This has been acknowledged also in the strategies adopted in the auspices of the Council of Europe.

2 Adopted Strategies: cyber hate and online liability

2.1 Treaty-Based Strategies

2.1.1 *Cybercrime Convention and Additional Protocol*

The most relevant treaty-based text in the context of this research could be the Cybercrime Convention of 2001, which aims to achieve a common policy to protect societies against cybercrime.³¹⁰ However, this instrument has been heavily criticized for failing to address problems of online racism and xenophobia.³¹¹ This shortcoming stems from the influence of the United States in the drafting of the convention. The initial draft included provisions aiming to regulate Internet-based incitement to hatred, but these were removed after the United States indicated that it would not sign the convention with these provisions.³¹² In order to rectify this shortfall, the Additional Protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (hereinafter ‘the Additional Protocol’) was drawn up and attached to the convention in 2003.³¹³

According to its Explanatory Report, the Additional Protocol aims to harmonize ‘substantive criminal law in the fight against racism and xenophobia on the Internet’ and improve international co-operation in this area.³¹⁴ It requires State Parties to adopt and enforce effective measures to criminalize various types of racist conduct committed via computer systems. The types of targeted conduct include (i) dissemination of racist and xenophobic material to the public, (ii) making racist and xenophobic motivated threats or insults, (iii) distributing to the public material that denies or approves genocide or crimes against humanity, (iv) and aiding or abetting any of these crimes.³¹⁵ All of these offences must be

³¹⁰ Cybercrime Convention, *supra* note 36. See also McGonagle, ‘A Survey and Critical Analysis’, *supra* note 94, at 470.

³¹¹ See among other authorities Parliamentary Assembly of the Council of Europe, Opinion No. 226 (2001) Draft convention on cybercrime, adopted on 24 April 2001; and Opinion No. 240 (2002) Draft additional protocol to Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, adopted on 27 September 2002. See also McGonagle, ‘The Council of Europe against Online Hate Speech’, *supra* note 31, at 19.

³¹² Keller, *European and International Media Law*, *supra* note 102, at 395; and Van Blaricum, “‘Internet Hate Speech’”, *supra* note 20, at 791.

³¹³ Council of Europe, Additional Protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, Strasbourg, 28 January 2003, in force 1 March 2006, *European Treaty Series* No.189.

³¹⁴ Explanatory Report to Additional Protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, Strasbourg, 28 January 2003, in force 1 March 2006, *European Treaty Series* No.189, § 3.

³¹⁵ Additional Protocol, *supra* note 313, Articles 3–6.

committed intentionally to amount criminal liability.³¹⁶ Moreover, the acts must have been committed without a right. According to the Explanatory Report, this refers to ‘conduct taken without authority’ or to ‘conduct that is otherwise not covered by established legal defences, excuses, justifications or relevant principles under domestic law’.³¹⁷ The idea behind this provision is to leave unaffected all conduct undertaken by authorities in context of their operations, and any conduct concerning, for example, ‘legitimate and common activities inherent in the design of networks, or legitimate and common operating or commercial practices’.³¹⁸ State Parties may determine how these exemptions are implemented within their domestic legal systems.³¹⁹ I will now shortly analyse the established offences in more detail.

Article 3 of the Additional Protocol requires State Parties to adopt necessary legislative and other measures to establish ‘distributing or otherwise making available, racist and xenophobic material to the public through a computer system’ as criminal offences. Several things should be noted about this provision. Firstly, the required ‘intent’ must be directed not only to the act of dissemination, but also to the ‘racist and xenophobic character of the material’.³²⁰ Secondly, the term ‘distribution’ refers to the ‘active dissemination’ of impugned material, whereas ‘making available’ refers to the placing of this material online. The latter term also covers ‘the creation or compilation of hyperlinks in order to facilitate access to such material’.³²¹ Thirdly, it should be noted that the phrase ‘to the public’ excludes emails and private messages from the scope of this Article. However, according to the Explanatory Report, exchanging prohibited material in chat rooms or posting such material in newsgroups may fall under the scope of this Article, even if accessing the relevant content requires a password. The only prerequisite for this is that the password would be given to anyone who meets certain predetermined criteria set by the online operator.³²² Finally, it is worth noting that State Parties are not obliged to criminalize acts where the material advocating discrimination is not associated with hatred or violence as long as other effective remedies are available for dealing with such acts. In addition, criminalization of the latter type of speech is not obligatory if it runs against the legal principles adopted in a State Party.

³¹⁶ Explanatory Report to Additional Protocol to the Convention on Cybercrime, *supra* note 314, § 25.

³¹⁷ *Ibid*, § 24 and McGonagle, ‘A Survey and Critical Analysis’, *supra* note 94, at 471.

³¹⁸ The intended operations of authorities include, inter alia, operations where the respective Government is acting to maintain public order, protect national security, or investigate criminal offences.

³¹⁹ Explanatory Report to Additional Protocol to the Convention on Cybercrime, *supra* note 314, § 24.

³²⁰ *Ibid*, § 27.

³²¹ *Ibid*, § 28.

³²² *Ibid*, § 31.

A State Party may also further restrict the scope of its reservation by requiring that the ‘discrimination is, for instance, insulting, degrading, or threatening a group of persons’.³²³ Some commentators have regarded this as endorsement of ‘self- and co-regulatory complaints and sanctioning mechanisms’. However, the Additional Protocol or the Explanatory Report do not elaborate on this possibility.³²⁴

Article 4 of the Additional Protocol addresses the racist and xenophobic motivated threats. It covers threats made in both private and public communication, unlike Article 5, which only covers racist and xenophobic motivated ‘insults’ made in public communication. According to the Explanatory Report, ‘insult’ refers to ‘any offensive, contemptuous or invective expression which prejudices the honour and dignity of a person’.³²⁵ At first glance, this specification seems to contradict the principle established in *Handyside* according to which freedom of expression covers information and ideas that ‘offend, shock or disturb the State or any sector of population’.³²⁶ However, this conflict has been circumvented by interpreting said Article in accordance with the Court’s case-law. Distinguishing between ‘insults without racist character’ and ‘racists insults’ is key, where the latter is regarded as qualitatively more severe.³²⁷ Additionally, Article 5 states that State Parties may require that the insult exposed the victim to ‘hatred, contempt or ridicule’.³²⁸ Moreover, State Parties may reserve the right to not apply this Article at all.³²⁹ Finally, Article 6 requires the criminalization of ‘denial, gross minimisation, approval or justification of genocide or crimes against humanity’. Similarly to the aforementioned Articles, this Article states that a State Party may require that the act is committed ‘with the intent to incite hatred, discrimination or violence’ against others based on prohibited criteria, or reserve the right to not apply this Article.³³⁰

These Articles show the comprehensive scope of the Additional Protocol. Unfortunately, to date only 23 States have ratified the Protocol, limiting its impact.³³¹ However, in this context

³²³ *Ibid*, § 32.

³²⁴ McGonagle, ‘A Survey and Critical Analysis’, *supra* note 94, at 471.

³²⁵ Explanatory Report to Additional Protocol to the Convention on Cybercrime, *supra* note 314, § 36.

³²⁶ See McGonagle, ‘A Survey and Critical Analysis’, *supra* note 94, at 472. *Handyside v. the United Kingdom*, *supra* note 96. See Part I, Section 1.2 Freedom of Expression in Practice, Classic case of *Handyside*.

³²⁷ See McGonagle, ‘A Survey and Critical Analysis’, *supra* note 94, at 472.

³²⁸ Explanatory Report to Additional Protocol to the Convention on Cybercrime, *supra* note 314, § 37.

³²⁹ *Ibid*, § 38.

³³⁰ *Ibid*, § 43.

³³¹ Treaty Office, Additional Protocol to the Convention on Cybercrime, <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=189&CM=1&DF=&CL=ENG>>, 4 January 2015.

it is important to note that although all European Union Member States have not ratified the Additional Protocol, they are all subject to the Council of the European Union's Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law.³³² This Decision requires even broader domestic legislation criminalizing incitement to hatred and covers the main objectives of the Additional Protocol.³³³ Moreover, with regard to liability issues in general, the European Union Member States are also subject to the EU E-Commerce Directive.³³⁴ This Directive is central for my analysis, because the Court has to assess its applicability when judging the defamation case of *Delfi*.³³⁵ Therefore, I will now shortly analyse and compare the stand on liability of the Additional Protocol and said Directive.

2.1.2 Liability under Additional Protocol and EU E-Commerce Directive

The Additional Protocol to Convention on Cybercrime primarily imposes liability on individuals and businesses engaging in prohibited conduct. This liability is intended to be predominantly criminal, but additional civil liability is not excluded. In fact, it has been specifically mentioned as an option in relation to the 'distribution or otherwise making available' of racist and xenophobic material.³³⁶ Moreover, the requirement of 'intent' associated with all listed offences is supposed to limit the liability of an online operator serving as a mere 'conduit, cache or host' for impugned material (in other words 'host providers'). These entities are also not required to monitor conduct on their services.³³⁷ However, this rule can be circumvented since neither the Additional Protocol nor the Explanatory Report defines the notion of 'intention'. This was expressly left for the national authorities to decide.³³⁸ Furthermore, the Explanatory Report states that 'although the transmission of racist and xenophobic material through the Internet requires the assistance of service provider as a conduit, a service provider that does not have the criminal intent cannot incur liability under this section'.³³⁹ In other words, liability of 'access providers'

³³² European Union, Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, 6 December 2008, *Official Journal of the European Union* L 328/55.

³³³ See Keller, *European and International Media Law*, *supra* note 102, at 395.

³³⁴ EU E-Commerce Directive, *supra* note 41.

³³⁵ *Delfi AS v. Estonia*, *supra* note 5.

³³⁶ See above relating to Article 3, Explanatory Report to Additional Protocol to the Convention on Cybercrime, *supra* note 314, § 32; and Van Blarcum, "'Internet Hate Speech'", *supra* note 20, at 798.

³³⁷ Explanatory Report to Additional Protocol to the Convention on Cybercrime, *supra* note 314, § 25. See also McGonagle, 'A Survey and Critical Analysis', *supra* note 94, at 471.

³³⁸ Explanatory Report to Additional Protocol to the Convention on Cybercrime, *supra* note 314, § 25.

³³⁹ *Ibid*, § 45.

requires acknowledged aiding of a crime. It is crucial to note that the Additional Protocol does not take a stand on the liability of ‘content providers’.

Similarly to the Additional Protocol, Article 12 of the EU E-Commerce Directive states that a service provider is not liable for the wrongful information it transmits provided that it, (i) ‘does not initiate the transmission’, (ii) ‘does not select the receiver of the transmission’, and (iii) ‘does not select or modify the information contained in the transmission’.³⁴⁰ Moreover, Article 15 of the same Directive establishes that Member States may ‘not impose a general obligation on providers... to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity’. However, although the Directive restricts the liability of ISPs in principle, it also imposes on them some specific responsibilities. Article 14 of the Directive states that service providers are not liable for the information stored at the request of a recipient provided that they do not have ‘actual knowledge of illegal activity or information’ and, regarding claims for damages, are not ‘aware of facts or circumstances from which the illegal activity or information is apparent’. Moreover, service providers are not liable if they, ‘upon obtaining... knowledge or awareness’ of illegal content, act ‘expeditiously to remove or to disable access to the information’. It is important to note that according to Recital 42 of the Directive, the Directive only covers cases where activity of the operator is limited to ‘mere technical, passive and automatic nature’. Accordingly, similarly to the Additional Protocol, the EU E-Directive leaves ‘content providers’ outside the definition of ISPs and does not elaborate on their liability.

2.2 Standard-Setting Texts

European Commission against Racism and Intolerance

ECRI has regularly called for greater monitoring of the dissemination of racist expressions via the Internet, and for appropriate prosecution of those responsible for such dissemination. This aim is reflected, above all, in ECRI’s country monitoring work, but it has also been addressed in GPR No. 6 on combating the dissemination of racist, xenophobic and anti-Semitic material via the Internet.³⁴¹ In this GPR, ECRI recommends, inter alia, strengthening

³⁴⁰ EU E-Commerce Directive, *supra* note 41.

³⁴¹ See ECRI Report on Finland (Third monitoring cycle): adopted on 15 December 2006, 24 May 2007, CRI(2007)23, § 91; Germany, *supra* note 170, §111; and Sweden, *supra* note 169, § 83. General Policy Recommendation No. 6 on combating the dissemination of racist, xenophobic and anti-Semitic material via the Internet, 15 December 2000, CRI(2001)1. See also McGonagle, ‘The Council of Europe against Online Hate Speech’, *supra* note 31, at 23.

international co-operation and ensuring the applicability of domestic criminal legislation in the field of dissemination of ‘racist, xenophobic and antisemitic material offences committed via the Internet’. Furthermore, Member States are encouraged to train their law enforcement authorities to deal with the problems associated with this type of dissemination, consider establishing a specialist ‘consultation body’, and support related existing initiatives. Interestingly, already in this document adopted in 2000, ECRI recommends the clarification of the responsibility issues concerning ‘content hosts’, ‘content providers’ and ‘site publishers’. The document also stresses the importance of supporting the Internet industry in adopting self-regulatory measures, and of increasing public awareness of problems associated with the dissemination of illegal material.³⁴²

Committee of Ministers

The Committee of Ministers has actively sought to adopt standard-setting texts on ‘cyber hate’ and online liability.³⁴³ Online ‘hate speech’ is mentioned in a Declaration adopted by the Committee in 2005.³⁴⁴ In this Declaration, the Committee urges Member States to ensure that their domestic legislation combatting illegal content, for example, racism and racial discrimination, applies equally to offences committed via traditional media and ICTs. However, simultaneously, Member States should ‘enhance legal and practical measures to prevent state and private censorship’. In this context, the Committee reminds Member States to encourage private sector actors to adopt ‘self- and co-regulation frameworks’ in order to ensure their commitment to protection of online freedom of expression.³⁴⁵

Also with regard to liability issues in general, the Committee has emphasized the importance of self-regulation and co-operation between authorities and relevant stakeholders.³⁴⁶ The most important text regarding liability is the Declaration on freedom of communication on

³⁴² General Policy Recommendation No. 6, *supra* note 341, at 4–5.

³⁴³ For a full list of Committees texts adopted with regard to media see Committee of Ministers, list of standard-setting texts adopted in the media field, available at http://www.coe.int/t/dghl/standardsetting/media/Doc/CM/CM_texts_en.pdf, 3 January 2015.

³⁴⁴ Declaration CM(2005)56 Human Rights and the rule of law in the Information Society, adopted on 13 May 2005.

³⁴⁵ *Ibid*, I Human rights in the Information Society, 1. The right to freedom of expression, information and communication, paras 3 and 4.

³⁴⁶ See Recommendation Rec(2001)8 of the Committee of Ministers to the Member States on self-regulation concerning cyber content (self-regulation and user protection against illegal or harmful content on new communications and information services), adopted on 5 September 2001 at the 762nd meeting of the Ministers’ Deputies; Recommendation Rec(2007)11 of the Committee of Ministers to the Member States on promoting freedom of expression and information in the new information and communications environment adopted on 26 September 2007 at the 1005th meeting of the Ministers’ Deputies; and Recommendation Rec(2007)16 of the Committee of Ministers on measures to promote the public service value of the Internet, adopted on 7 November 2007.

the Internet, adopted in 2003.³⁴⁷ In this Declaration, the Committee states that obligations to monitor Internet content or to actively seek ‘facts or circumstances indicating illegal activity’ should not be imposed on service providers. Accordingly, ISPs should not be held liable for any content that they merely transmit or provide access to. The only situation in which these ‘access providers’ can be held co-responsible is when their operations go beyond transmission or providing access and they fail to ‘act expeditiously’ to remove or block content after becoming aware of its illegal nature or, in the event of a claim for damages, of ‘facts or circumstances revealing’ this illegality.³⁴⁸ Moreover, ‘intermediaries’ purely hosting content produced by third parties should not, in principle, be held liable for such content. An exemption can be made if it is proved that the ‘host provider’ was aware of the illegal content or, in cases where there is a claim for damages, of facts revealing its illegality. These conditions should, however, be outlined in national law.³⁴⁹ Caution should also be applied when imposing liability on ISPs for not removing content expeditiously subject to a request. This is important especially noting the risks inherent to the removal of completely legitimate content.³⁵⁰ In addition, the Committee takes a stand on anonymity by stressing that Member States need to respect the choice of Internet users not to disclose their identity provided that they are not engaging in criminal activities.³⁵¹ All in all, this Declaration is a powerful statement that excludes ISPs, namely ‘access providers and ‘host providers’, from liability. As such, it is in line with Articles 12 to 15 of the EU E-Commerce Directive discussed above.³⁵²

Similarly to the Additional Protocol and the EU E-Commerce Directive, the Committee Declaration on freedom of communication on the Internet leaves ‘content providers’ outside the ‘limited liability regime’ that applies to ISPs. However, the following question remains: When is an entity defined as an ‘intermediary’ ISP? An important text in this regard is the Committee’s Recommendation on a new notion of media.³⁵³ In this Recommendation, the

³⁴⁷ Declaration on freedom of communication on the Internet, *supra* note 37.

³⁴⁸ *Ibid*, § 6.

³⁴⁹ Council of Europe in co-operation with the European Internet Services Providers Association, ‘Human rights guidelines for Internet service providers’, *supra* note 37, at 9.

³⁵⁰ *Ibid*, at 10.

³⁵¹ Declaration on freedom of communication on the Internet, *supra* note 37, § 7.

³⁵² Council of Europe in co-operation with the European Internet Services Providers Association, ‘Human rights guidelines for Internet service providers’, *supra* note 37, at 9.

³⁵³ Recommendation CM/Rec(2011)7 of the Committee of Ministers to the Member States on a new notion of media, adopted on 21 September 2011 at the 1121st meeting of the Ministers’ Deputies. This Recommendation was inspired by the 1st Council of Europe Conference of Ministers responsible for Media and New Communications Services, Reykjavik, 28-29 May 2009; and Jakubowicz, ‘A new notion of media?’ *supra* note 35.

Committee recognizes that the emergence of ICTs has created a need to adopt a new and broader notion of media. The Recommendation introduces more detailed criteria and indicators as to which entities are considered to belong this new category.³⁵⁴ An entity is considered part of the new media category if it shows: (i) ‘intent to act as media’, (ii) ‘purpose and underlying objectives of media’, (iii) practice of editorial control, (iv) adherence to professional standards, (v) notable outreach and dissemination, and (vi) public expectation as to media value.³⁵⁵ These criteria are not of equal weight. An entity will automatically not be regarded as media if it does not meet the core criteria of purpose, editorial control, or outreach and dissemination.³⁵⁶ Meeting core criteria is a feature presumed to distinguish media from ‘intermediaries’ and ‘auxiliaries’, where these latter entities tend not to meet all said criteria. However, due to the active role of ‘intermediaries’ in mass communication, the Recommendation instructs Member States to consider ‘intermediaries’ in their media-related policy.³⁵⁷ Nevertheless, first and foremost, the Recommendation stresses the need to review the regulatory frameworks with regard to the ‘new media’ actors. It stresses that the relevant safeguards against unjustified interferences, ‘which risk leading to undue self-restraint or self-censorship’, must be extended to them.³⁵⁸ Consequently, to balance the special safeguards, these actors should be required to show diligence similar to that required from media professionals.³⁵⁹ The following is stated specifically regarding ‘hate speech’:

*‘Media should refrain from conveying hate speech and other content that incites violence or discrimination for whatever reason. Special attention is needed on the part of actors operating collective online shared spaces which are designed to facilitate interactive mass communication. They should be attentive to the use of, and editorial response to, expressions motivated by racist, xenophobic, anti-Semitic, misogynist, sexist (including as regards LGBT people) or other bias...’*³⁶⁰

³⁵⁴ Recommendation CM/Rec(2011)7, *supra* note 353, § 7. The aim of this new notion of media is to encompass ‘all actors involved in the production and dissemination, to potentially large numbers of people, of content...and applications which are designed to facilitate interactive mass communication...or other content-based large-scale interactive experiences...while retaining...editorial control or oversight of the contents’.

³⁵⁵ See on criteria and relevant indicators Appendix to Recommendation CM/Rec(2011)7, §§ 16–55.

³⁵⁶ Recommendation CM/Rec(2011)7, *supra* note 353, Appendix to Recommendation, § 11.

³⁵⁷ *Ibid*, § 15.

³⁵⁸ Recommendation CM/Rec(2011)7, *supra* note 353, § 7.

³⁵⁹ Recommendation CM/Rec(2011)7, *supra* note 353, Appendix to Recommendation, C. Media responsibilities, § 84.

³⁶⁰ *Ibid*, § 91.

Parliamentary Assembly

Similarly to the Committee of Ministers, the Parliamentary Assembly has been active in adopting texts regarding ICT-based media.³⁶¹ In an early Resolution adopted in 1999, the Assembly calls Member States and the EU to pass laws in order to control the ‘inevitable flood of information technology crimes’, and to encourage the use of ICT-based media and the adoption of codes of conduct and ethical codes for this type of media.³⁶² In 2001, the Assembly adopted a further Recommendation concerning racism and xenophobia in cyberspace.³⁶³ This Recommendation urges quick adaption of the Additional Protocol to the Convention on Cybercrime and encourages discussion with ISPs ‘to convince them of the need to take steps themselves to combat the existence of racist sites’.³⁶⁴ It also makes a very interesting suggestion ‘on the ethical level’. It recommends that self-disciplinary efforts of ‘access providers’ and ‘hosts’ should be made a norm by ‘labelling and classifying sites, setting up hotlines, filtering, drawing up rules of conduct and including clauses in contracts with technical providers prohibiting their clients from using their services for unlawful purposes’.³⁶⁵

On the other hand, the Assembly has also stressed that online ‘intermediaries’ should be held responsible for unlawful content only ‘if they are the author of such content or have the obligation under national law to remove unlawful third-party content’.³⁶⁶ On the contrary, concerning media actors, the Assembly has specifically emphasized the duties of journalists in the changing technological environment. It has noted that journalists’ new ability to cross international borders with ease also brings with it new demands ‘such as requiring new skills, greater knowledge and ongoing training’.³⁶⁷

Ministerial Conference

The Ministerial Conference on Mass Media Policy has also actively addressed issues regarding ‘cyber hate’ and liability. However, compared to other bodies, the Conference has had a greater emphasis on protecting freedom of expression. The Ministers’ most active

³⁶¹ For a full list of texts adopted by the Parliamentary Assembly in media context see Parliamentary Assembly, list of standard-setting texts adopted in the media field,

<http://www.coe.int/t/dghl/standardsetting/media/doc/pace_EN.asp>, 3 January 2015.

³⁶² Resolution 1191 (1999) on the information society and a digital world, adopted on 26 May 1999, § 4(x).

³⁶³ Recommendation 1543 (2001) on racism and xenophobia in cyberspace, adopted on 8 November 2001.

³⁶⁴ *Ibid*, §§ 3 and 8(i).

³⁶⁵ *Ibid*, §§ 4 and 5.

³⁶⁶ Resolution 1877 (2012) the protection of freedom of expression and information on the Internet and online media, adopted on 25 April 2012, § 11(11.5).

³⁶⁷ Recommendation 1789 (2007) on professional education and training of journalists, adopted on 16 March 2007, § 2.

engagement concerning ‘cyber hate’ was taken in their Fifth Conference held in 1997.³⁶⁸ In Conference Resolution No. 2, Member States are called to ensure that measures combating the dissemination of incitement to ‘racial hatred, xenophobia, antisemitism and all forms of intolerance’ through ICTs ‘duly respect freedom of expression and, where applicable, the secrecy of correspondence’.³⁶⁹ In addition, Member States should reinforce co-operation within the Council of Europe in order to find solutions at the European and global level ‘to problems of delimiting public and private forms of communication, liability, jurisdiction and conflict of laws in regard to “hate speech” disseminated through the new communications and information services’.³⁷⁰ The Conference Action Plan proposes ‘periodical evaluation’ of the Member States ‘follow-up’ on the relevant recommendations of the Committee of Ministers’, such as the twin recommendations adopted in 1997.³⁷¹

Moreover, in the Seventh Conference organized in 2005, the Ministers noted the problems inherent to imposing liability on Internet ‘intermediaries’. In this context, Action Plan for the Conference recommends that Member States, where necessary, ‘take any initiative, including the preparation of guidelines, inter alia, on the roles and responsibilities of “intermediaries” and other Internet actors in ensuring freedom of expression’.³⁷² On the other hand, in the Conference of 2013, organized under the new name of Ministers Responsible for Media and Information Society, the Ministers note the role of media operators in the dissemination of ‘cyber hate’ and in fostering ethical journalism both offline and online. The Conference Political Declaration notes the ‘widespread and growing phenomenon’ of online ‘hate speech’ requiring concerted action at ‘national and transnational levels’.³⁷³

³⁶⁸ 5th European Ministerial Conference on Mass Media Policy, 11–12 December 1997, Thessaloniki.

³⁶⁹ Resolution No.2 of the 5th European Ministerial Conference on Mass Media Policy, Thessaloniki, 11–12 December 1997, Strasbourg, 2006, DH-MM (2006) 4, *supra* note 193, § 8(ii).

³⁷⁰ *Ibid*, § 8(iii).

³⁷¹ Action Plan of the 5th European Ministerial Conference on Mass Media Policy, Thessaloniki, 11–12 December 1997, Strasbourg, 2006, DH-MM (2006) 4, *supra* note 193, F. Action in the area of violence and intolerance. See on twin recommendations Part I, Section 2.2 Standard-Setting Texts, Committee of Ministers.

³⁷² Action Plan of the 7th European Ministerial Conference on Mass Media Policy, Kyiv, 10–11 March 2005, Strasbourg, 2006, DH-MM (2006) 4, *supra* note 193, Sub-theme 3, § 3.

³⁷³ Political Declaration of the Conference of Ministers responsible for media and information society, Belgrade, 7–8 November 2013, Political declaration and resolutions, 8 November 2013, available at <http://www.coe.int/t/dghl/standardsetting/media/belgrade2013/Belgrade%20Ministerial%20Conference%20Texts%20Adopted_en.pdf>, 21 February 2015.

3 Online Liability for Wrongful Content in Practice

3.1 State Liability

As mentioned previously, in the context of liability (online or otherwise), the failure to ensure the protection of ‘human rights’ is always primarily attributable to a State Party to the relevant ‘human rights’ instrument. This is due to the nature of ‘human rights’ discussed in the beginning of this research.³⁷⁴ Accordingly, the positive obligations of the Member States of the Council require them to ensure that actions of ISPs do not violate the rights of others. The Court discussed this issue in the case of *K.U. v. Finland*, which concerned the posting of an advertisement in the name of a 12-year-old boy by an anonymous person on an online dating site. At the time of the offence, Finnish law did not permit ordering the dating site operator to identify the offender.³⁷⁵ In its judgment, the Court states the following:

*‘Although freedom of expression and confidentiality of communications are primary considerations and users of telecommunications and Internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others’.*³⁷⁶

The Court concluded that the authorities had breached the child’s right to private life, because they had failed to fulfil their positive obligation to effectively ‘reinforce the deterrent effect of criminalisation by applying criminal law provisions in practice through effective investigation and prosecution’.³⁷⁷ This same positive obligation justifies the imposition of liabilities on different online operators.³⁷⁸

3.2 Liability of Internet Service Providers

3.2.1 Definition of user-generated online content

Before analysing the possible imposition of liability on ISPs (or any other entities) for user-generated online content, I must try to define this content. As stated by the Head of

³⁷⁴ See Introduction, 1 Starting Point.

³⁷⁵ See *K.U. v. Finland*, *supra* note 34.

³⁷⁶ *Ibid.*, § 49.

³⁷⁷ *Ibid.*, § 46.

³⁷⁸ See the discussion under Introduction, Section 1 Starting Point, Liability for wrongful conduct.

Department for Legal Information of European Audio-visual Observatory, Susanne Nikoltchev:

*‘From the rise of blogs which allowed private individuals to publish content on their own platform, to the opening of comment sections at the end of newspaper articles, to the inclusion of user-generated films in news reports, the “professional” media have come to absorb user-generated content as a supplementary source of content’.*³⁷⁹

Tarlach McGonagle has defined user-generated content as ‘means facilitating individual engagement with the media, both in production of content and in reaction to content’. This type of content can be created individually, but more often it is the result of collaborative work between several individuals.³⁸⁰ Moreover, the Organisation for Economic Co-operation and Development established in its 2007 report three characteristics inherent to user-generated content. These characteristics are the following: (i) that the content has been published, (ii) that ‘certain amount of creative effort has been put into creating the work or adapting existing works to construct a new one’, and (iii) that the content has been ‘created outside of professional routines and practices’.³⁸¹ The first important legal question regarding user-generated content concerns the level of protection afforded to its creators. As mentioned previously, according to Karol Jakubowicz, if the content ‘fulfils the democratic functions ascribed to media and journalists’, its creators should be able to enjoy – at least to some extent – the enhanced freedom afforded to the press.³⁸² However, in this situation, these ‘new media’ actors are also ‘expected to adhere to similar ethical standards and values’ as actual media professionals.³⁸³ Nonetheless, for my research, the relevant question is the following: Can online operators be held responsible for user-generated content they allow?

³⁷⁹ Nikoltchev, Susanne, ‘Publish and be damned?’, *IRIS Plus 2013-2 “Open Journalism”*, Foreword, European Audiovisual Observatory, April 2013, available at <<http://www.obs.coe.int/documents/205595/865106/IRIS+plus+2013en2+LA.pdf/31de1179-1b3e-4a11-90a2-3433fe592d17>>, 4 January 2015, at 3.

³⁸⁰ McGonagle, ‘User Generated Content’, *supra* note 124, at 8.

³⁸¹ Organisation for Economic Co-operation and Development, Working Party on the Information Economy, ‘Participative web: user-created content’, 12 April 2007, DSTI/ICCP/IE(2006)7/FINAL.

³⁸² McGonagle, ‘User Generated Content’, *supra* note 124, at 13. In some countries enhanced protection has been afforded for example with regard to right not to reveal sources. See on this Jakubowicz, ‘A new notion of media?’, *supra* note 35, at 23.

³⁸³ McGonagle, ‘User Generated Content’, *supra* note 124, at 13.

3.2.2 ISPs as Gate-keepers: example of Blogger

As mentioned previously, although ISPs, namely ‘host providers’ and ‘access providers’, are subject to a ‘limited liability regime’, all online operators might carry out functions that can be described as media-like or editorial. For example, Karol Jakubowicz has argued that ‘intermediaries’ often perform ‘a gate-keeping role’ in freedom of expression.³⁸⁴ First of all, they can apply guidelines such as ‘house rules’ or ‘content policy’ outlining the kind of content their users are allowed to disseminate through their services. A good example is Google, Inc., which has adopted the following ‘content policy’ on user-generated ‘hate speech’ on its web-blog tool Blogger:

*‘Hate Speech: Our products are platforms for free expression. But we don’t support content that promotes or condones violence against individuals or groups based on race or ethnic origin, religion, disability, gender, age, nationality, veteran status or sexual orientation/gender identity, or whose primary purpose is inciting hatred on the basis of these core characteristics. This can be a delicate balancing act but, if the primary purpose is to attack a protected group, the content crosses the line.’*³⁸⁵

The idea behind such policies is that if the content posted on the service does not conform to the criteria outlined, it risks being moderated. This type of moderation inevitably requires editorial judgment and may lead to removal of the content, ‘depriving its author of a chance to reach an audience, and the audience of access to the contents’.³⁸⁶ As mentioned previously, different types of moderation can be used for this purpose.³⁸⁷ One, and perhaps the most extreme method, is ‘pre-moderation’, which entails revision of the user-generated content prior to publication. A related method is ‘post-moderation’, which allows immediate publication of content, although moderators may ‘review, make changes or delete the content after it has been posted’. Another method is ‘peer-based moderation’, which also allows immediate publication of user-generated content provided that it can be ‘edited, reviewed or even deleted by certain or all users of the same platform’.³⁸⁸ The ‘notice-and-takedown-button’ is a widely used example of the latter type of moderation.³⁸⁹ Other service users may

³⁸⁴ Jakubowicz, ‘A new notion of media?’, *supra* note 35, at 24 and 26.

³⁸⁵ Google, Inc., ‘Blogger Content Policy’ <<https://www.blogger.com/content.g?hl=en-GB>>, 3 January 2015.

³⁸⁶ Jakubowicz, ‘A new notion of media?’, *supra* note 35, at 24.

³⁸⁷ See in Introduction, Section 2.2.2.2 Bulletin board operators, Duties of bulletin board operators.

³⁸⁸ Jakubowicz, ‘A new notion of media?’, *supra* note 35, at 25.

³⁸⁹ See Introduction, Section 2.2.2.2 Bulletin board operators, Duties of bulletin board operators.

report offensive content using this button and the content is then reviewed by the service provider. This system is used, for example, in Google's Blogger tool, where the following statement regarding enforcement of 'content policy' can be found:

*'If you encounter a blog that you believe violates our content policies, please report it to us using the "Report Abuse" link... Our team reviews these flags for policy violations. If the blog does not violate our policies, we will not take any action against the blog or blog owner.'*³⁹⁰

Additionally, ISPs can enforce 'terms of use' that 'introduce a vast array of rules pertaining to content and expression on the Internet'. According to Jakubowicz, this effectively 'invests ISPs with a "regulatory" function and gives ISP rules a "media law-like effect"'.³⁹¹ Accordingly, imposing some liability on ISPs for user-generated content might be justifiable given their ability to extensively moderate the disseminated content.³⁹²

3.2.3 Liability for user-generated content

The situation becomes problematic in terms of freedom of expression if liabilities are imposed on ISPs with the consequence that they start to restrict online speech more than what is required by law. Extensive restriction of online content is tempting for service providers, because it maximizes their chances of avoiding liability for third-party-content. Academic commentators have voiced their concerns about this kind of 'privatisation of censorship'. For example, Damian Tambini has stressed that online self-regulation potentially imposes undesired limits on freedom of expression, which might lead to 'a clash between freedom-of-expression rights such as they are laid out in Article 10 ECHR, and the limitations on speech imposed by self-regulatory bodies'.³⁹³ Accordingly, any imposition of liability requires extremely careful consideration of the individual circumstances of each case.

³⁹⁰ Google, Inc., 'Enforcement of Blogger's Content Policy', <<https://www.blogger.com/content.g?hl=en-GB>>, 3 January 2015. If a blog is found to violate Blogger's content policies, the moderation takes one or more of the following actions based on the severity of the violation: 'put the blog behind a 'mature content' interstitial'; 'put the blog behind an interstitial where only the blog author can access the content'; 'delete the offending content, blog post or blog'; 'disable the author's access to his/her Blogger account'; 'disable the author's access to his/her Google account'; or 'report the user to law enforcement'.

³⁹¹ Jakubowicz, 'A new notion of media?', *supra* note 35, at 25.

³⁹² Additional Protocol, *supra* note 313; and Declaration on freedom of communication on the Internet, *supra* note 37. See also Jakubowicz, 'A new notion of media?', *supra* note 35, at 24 and 26. See also Recommendation CM/Rec(2011)7, *supra* note 353.

³⁹³ Tambini, Damian; Leonardi, Danilo; and Marsden, Christian, *Codifying Cyberspace: Communications Self-Regulation in the Age of Internet Convergence* (Routledge, Oxon, 2008), at 284.

One way of balancing ISPs' right to freedom of expression and their liabilities could be to accompany the awareness of illegal content requirement with a 'duty of diligence' meaning the application of requirement 'knew or should have known of the illegal content'.³⁹⁴ ECRI has suggested the adaption of this requirement regarding 'host providers' in its General Conclusions regarding the dissemination of racist messages via the Internet, adopted in 2000.³⁹⁵ These Conclusions state the following:

*'ECRI underlines the necessity of making distinction between the function of access provider and that of host provider and of clearly establishing their respective responsibilities. While the access provider should be held liable for illegal content of which it was aware and which it had not blocked, the host provider should have a wide duty of diligence as regards especially those sites which it hosts anonymously and free of charge.'*³⁹⁶

3.3 Media's Online Liability

3.3.1 Journalists writing online

Imposing liability is less problematic with regard to online media actors, especially when they are the originators of the impugned material. This is due to the fact that, as discussed previously, the Court has in its case-law afforded the press enhanced protection, which is, however, coupled with increased responsibilities.³⁹⁷ The very same principles seem to be applied to online publications, as demonstrated in the aforementioned case of *Times Newspapers Ltd (Nos 1 and 2)*.³⁹⁸ In this case, the Court analysed whether a common law rule, which states that each publication of a defamatory statement raises a separate cause for action, should be applied to online publications. In practice, this would mean that a new cause of action accrues each time the same defamatory material is accessed online. Specifically, this case concerned two news reports on a money-laundering scheme carried out by an alleged Russian mafia boss. Both articles were published in the newspaper as well as on the newspaper's website. An action for libel was brought forward in relation to the

³⁹⁴ See the principles established in the US legal praxis with regard to classical media and the so-called 'secondary publishers'. See Introduction, Section 2.2.2.1 Traditional media.

³⁹⁵ General Conclusions, 'Legal Instruments to Combat Racism on the Internet', report prepared by the Swiss Institute of Comparative Law, Strasbourg, August 2000, CRI (2000) 27.

³⁹⁶ *Ibid*, § 4.

³⁹⁷ See Part I, Section 1.2 Freedom of Expression in Practice, Special protection afforded to media.

³⁹⁸ *Times Newspapers Ltd (Nos 1 and 2) v. the United Kingdom*, *supra* note 287. See 'Internet: Case-law of the European Court of Human Rights', *supra* note 258, at 12. See in Part II, Section 1.1 Court and Unique Features of Internet.

newspaper's Internet archive, where past issues of the paper continued to be accessible to readers. The Court found no violation of Article 10 ECHR. It agreed with the domestic court's view that continued access to the articles amounted to libel.³⁹⁹ In its analysis, the Court stresses that a greater 'margin of appreciation' is to be afforded to States in cases regarding news archives than with regard to news reporting of current affairs. Moreover, according to the Court, the obligation to publish a qualification to the impugned articles did not constitute a disproportionate interference with freedom of expression, particularly since the newspaper had been aware of the pending libel proceedings.⁴⁰⁰ Some commentators have suggested that this judgment should be interpreted in a way that liberates media from liability whenever it is not aware of the impugned nature of archived content. Thus, any obligation to constantly review archives would be in breach of Article 10.⁴⁰¹

Another interesting case is the case of *Fatullayev v. Azerbaijan*, concerning criminal proceedings related to a newspaper article and online forum posts that questioned the events related to a war in which hundreds of Azerbaijani civilians died.⁴⁰² The applicant had signed the article, but denied authorship of the posts. Domestic courts convicted the applicant of defamation. In its analysis of the case, the Court accepts that the applicant's authorship of the forum posts had been verified beyond reasonable doubt. Furthermore, the Court states that because the applicant made the posts 'without relying on any relevant factual basis, he might have failed to comply with the journalistic duty to provide accurate and reliable information'. Therefore, with this judgment the Court established that the principle of 'responsible journalism' extends beyond journalists' employer's websites.⁴⁰³ However, after analysing the content of the texts, the Court found that they did not undermine the dignity of the victims and survivors of the war. Accordingly, in this case the Court concluded that the domestic courts had not given 'relevant and sufficient' reasons for convicting the applicant.⁴⁰⁴ Accordingly, with regard to online material authored by journalists, the Court

³⁹⁹ European Court of Human Rights, Registrar, 'Chamber judgment Times Newspapers Ltd (Nos 1 and 2) v. United Kingdom', Press release, 10 March 2009,

<[⁴⁰⁰ Vajić & Voyatzis, 'The Internet and Freedom of Expression', *supra* note 28, at 406.](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{'itemid':['003-26602932907014']}>, 4 January 2015.</p>
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⁴⁰¹ See Mora, Paul David, 'The Compatibility with Article 10 ECHR of the Continued Publication of a Libel on the Internet: Times Newspapers Ltd (Nos 1 and 2) v The United Kingdom', 20 *Entertainment Law Review* 6 (2009), 226–228, at 228; and Vajić & Voyatzis, 'The Internet and Freedom of Expression', *supra* note 28, at 406.

⁴⁰² *Fatullayev v. Azerbaijan*, Application no 40984/07, 22 April 2010.

⁴⁰³ *Ibid.*, § 94.

⁴⁰⁴ European Court of Human Rights, Registrar, 'Chamber judgment Fatullayev v. Azerbaijan', Press release, 22 April 2010, <[72](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{'itemid':['003-3098666-3440142']}>, 4 January 2015.</p>
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has had no difficulties in applying the same principles as in printed media cases. However, the situation is more complicated concerning media's liability for user-generated online content.

3.3.2 Liability for user-generated content

3.3.2.1 Court's approach on media's liability for user-generated content

The Court has had the opportunity to discuss the liability of journalists for user-generated online content only a few times. One such judgment was given in the aforementioned case of *Editorial Board of Pravoye Delo and Shtekel*, which concerned the reprinting of an anonymous online letter, which accused local authorities of engaging in corruption and criminal activities.⁴⁰⁵ The article published by the applicant company referenced the original source of information and included a note of caution from the editorial board indicating that the information in the letter might be false. Thus, the newspaper clearly distanced itself from the information presented in the letter. According to Ukrainian law at the time of the case, journalists could not be held liable for reproducing material published elsewhere in the press. However, such immunity did not apply with regard to unregistered website sources. Furthermore, no domestic rules existed on registration of Internet media. In its analysis of the case, the Court seems to suggest that the press should not be held liable for third party content published online if it clearly states that the views expressed are that of the third party.⁴⁰⁶ However, a key element in this case was the lack of legal framework, which hampered the press' ability to function as a 'public watchdog'.⁴⁰⁷ This led the Court to find a violation of Article 10 ECHR. Consequently, the Court imposed a positive obligation on all States to provide legal regulation allowing the press to exercise freedom of expression on the Internet without interference.⁴⁰⁸

The ruling in *Editorial Board of Pravoye Delo and Shtekel*, is relevant because it invited the Member States to 'rethink of familiar principles of media freedom and regulation', and adapt them to the 'expansive, global context of the Internet'.⁴⁰⁹ However, the most relevant case

⁴⁰⁵ See in Part II, Section 1.1 Court and Unique Features of Internet. *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, *supra* note 293.

⁴⁰⁶ Parallels can be drawn, among other authorities, with the case of *Jersild v. Denmark*, *supra* note 106.

⁴⁰⁷ See European Court of Human Right, Registrar, 'Chamber judgment Editorial Board of Pravoye Delo and Shtekel v. Ukraine', Press release, 5 May 2011, <[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{'itemid':\['003-35264643979688'\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{'itemid':['003-35264643979688']}>)>, 4 January 2015.

⁴⁰⁸ See 'Internet: Case-law of the European Court of Human Rights', *supra* note 258, at 11–12. See also Vajić & Voyatzis, 'The Internet and Freedom of Expression', *supra* note 28, at 400.

⁴⁰⁹ McGonagle, 'User Generated Content', *supra* note 124, at 16.

concerning media's liability for user-generated online content is the case that inspired this whole research: *Delfi AS v. Estonia*.⁴¹⁰

3.3.2.2 *Delfi AS v. Estonia*

First section judgment

The case of *Delfi AS v. Estonia* exemplifies well how the liability related rules and principles outlined during this research are applied in practice.⁴¹¹ The First Section of the Court begun its analysis of this case by acknowledging that (unlike the comments in question) the news article published on *Delfi*'s news portal was balanced and addressed a topic of a certain degree of public interest. However, the First Section took the view that *Delfi* should have realized that this article 'might cause negative reactions' against the shipping company and its managers. Furthermore, there was 'a higher-than-average risk that the negative comments could go beyond the boundaries of acceptable criticism and reach the level of gratuitous insult or hate speech'. The First Section concluded that *Delfi* should have exercised a degree of caution to avoid liability for said comments.⁴¹² The First Section then examined the measures taken by *Delfi* to manage readers' comments in general. In particular, it noted that *Delfi* had utilized an 'automatic filter' to detect comments containing offensive words and an easy-to-use 'notice-and-takedown system', which readers could use to report inappropriate comments. However, the First Section found that, although the filter was useful, it was 'insufficient for preventing harm being caused to third parties'. Additionally, the First Section stressed that, although the 'notice-and-takedown system' was convenient for users, it had obviously failed in the present case since the impugned comments had continued to be accessible to the public for six weeks. The First Section attached no significance to the fact that the defamed person had refrained from using the 'notice-and-takedown system', or to the fact that the comments were removed immediately after *Delfi* received a notice from said person's lawyers.⁴¹³

In addition, the First Section noted that in 2006 *Delfi* had exercised a substantial degree of control over its comment platform. The First Section argued that *Delfi* had been 'in a position

⁴¹⁰ *Delfi AS v. Estonia*, supra note 5

⁴¹¹ *Delfi AS v. Estonia*, supra note 5.

⁴¹² *Delfi AS v. Estonia*, supra note 5, § 86. See also ARTICLE 19, 'European Court strikes serious blow to free speech online', Statement, 14 October 2013, <<http://www.article19.org/resources.php/resource/37287/en/european-court-strikes-serious-blow-to-free-speech-online>>, 4 January 2015.

⁴¹³ *Delfi AS v. Estonia*, supra note 5, §§ 87 and 88. See also ARTICLE 19, 'European Court strikes serious blow', supra note 412.

to know about an article to be published, to predict the nature of the possible comments prompted by it and, above all, to take technical or manual measures to prevent defamatory statements from being made public'. Unlike the authors, *Delfi* could also modify and delete the comments after they had been posted.⁴¹⁴ The First Section argued that by choosing to allow comments by non-registered users, *Delfi* had assumed certain responsibility for them.⁴¹⁵ Although the First Section noted that identifying and removing all defamatory statements is a laborious task, it stressed that it would be 'an even more onerous task for a potentially injured person, who would be less likely to possess resources for continual monitoring of the Internet'.⁴¹⁶ Furthermore, the First Section took the view that the fact that *Delfi* was obliged to pay the affected person 320 euros in non-pecuniary damages should by no means be regarded as a disproportionate penalty.⁴¹⁷ Lastly, the First Section noted that the domestic courts had given *Delfi* considerable leeway in not requiring it to take any specific measures in order to avoid liability in the future.⁴¹⁸ For all these reasons, the Chamber of the First Section of the Court unanimously ruled that Estonia had not breached the applicant's Convention rights.

Criticism

The First Section judgment in *Delfi* received widespread criticism. For example, an article published in *the Guardian* stated that the judgment should 'send a shiver of fear down any website operator's spine'.⁴¹⁹ Furthermore, the judgment was immediately analysed by, ARTICLE 19, an international organization specializing in freedom of expression issues. In its statement, ARTICLE 19 criticized the judgment as displaying 'a worrying lack of understanding of the issues surrounding intermediary liability and the way in which the Internet works', and called the judgement 'a serious blow to freedom of expression online'.⁴²⁰ Dirk Voorhoof also commented on the case in *the Strasbourg Observers*, a blog that follows the case-law of the Court. According to these critics, the most controversial aspect of the First Section ruling is that it accepted the classification of *Delfi* as a 'content

⁴¹⁴ *Delfi AS v. Estonia*, *supra* note 5, § 89.

⁴¹⁵ *Ibid*, § 91. However, in this context, the First Section also notes and accepts the wishes of Internet users to sustain anonymity in exercising their freedom of expression online.

⁴¹⁶ *Delfi AS v. Estonia*, *supra* note 5, § 92.

⁴¹⁷ *Ibid*, § 93. See also ARTICLE 19, 'European Court strikes serious blow', *supra* note 412.

⁴¹⁸ *Delfi AS v. Estonia*, *supra* note 5, § 90. See also ARTICLE 19, 'European Court strikes serious blow', *supra* note 412.

⁴¹⁹ Banks, David, 'Online comments: why websites should be worried by court ruling: Judgment in Estonian case suggests sites need to police comments and predict when a story will attract defamatory posts', *the Guardian*, Media Blog, 11 October 2013, available at <<http://www.theguardian.com/media/media-blog/2013/oct/11/online-comments-websites-court-ruling-estonian>>, 4 January 2015.

⁴²⁰ ARTICLE 19, 'European Court strikes serious blow', *supra* note 412.

provider’ and not as an ‘intermediary internet service provider’ in relation to the user-generated comments. As demonstrated above, this effectively qualifies *Delfi* as an editor of the comments with traditional editorial responsibilities. In his post for *the Strasbourg Observers*, Voorhoof stressed that this classification has far-reaching, negative consequences for online freedom of speech in general.⁴²¹

According to ARTICLE 19, the First Section’s biggest failure was overlooking the EU E-Commerce Directive.⁴²² In its statement, the organization claims that, in the light of Article 14 of the Directive, platforms such as *Delfi* should be encouraged to remove illegitimate user-generated content upon notice, and their adherence should be rewarded with immunity from liability.⁴²³ Accordingly, these entities should only be faced with liability if they fail to take action upon notice. Moreover, according to ARTICLE 19, the First Section’s view that *Delfi* should have prevented the defamatory comments from being made public in the first place is incompatible with Article 15 of the Directive, which forbids the imposition of monitoring obligations on information society services.⁴²⁴ In addition, ARTICLE 19 expressed its disappointment at the fact that the First Section ignored international standards developed, for example, by the UN Special Rapporteur on Freedom of Expression (hereinafter ‘the UN Special Rapporteur’) in his thematic report on the Internet.⁴²⁵ In this report, the UN Special Rapporteur clearly states that ‘censorship measures should never be delegated to private entities, and that no one should be held liable for content on the Internet of which they are not the author’.⁴²⁶

The First Section’s implicit approval of ‘notice-and-takedown systems’ was also criticized. Voorhoof argued that such a system ‘reduces the monitoring process to a mere technical, non-transparent and very superficial interference with the right of freedom of expression in the online environment, with a clear risk of overbroad removal or blocking of online content protected according to Article 10 standards’.⁴²⁷ According to ARTICLE 19, the First

⁴²¹ Voorhoof, Dirk, ‘Qualification of news portal as publisher of users’ comment may have far-reaching consequences for online freedom of expression: *Delfi AS v. Estonia*’, *Strasbourg Observers*, 25 October 2013, <<http://strasbourgobservers.com/2013/10/25/qualification-of-news-portal-as-publisher-of-users-comment-may-have-far-reaching-consequences-for-online-freedom-of-expression-delfi-as-v-estonia/>>, 4 January 2015.

⁴²² EU E-Commerce Directive, *supra* note 41.

⁴²³ See on this in Part II, Section 2.1.2 Liability under Additional Protocol and EU E-Commerce Directive.

⁴²⁴ ARTICLE 19, ‘European Court strikes serious blow’, *supra* note 412. See Section 2.1.2 Liability under Additional Protocol and EU E-Commerce Directive.

⁴²⁵ La Ru, Frank, Special Rapporteur, ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression’, 16 May 2011, A/HRC/17/27.

⁴²⁶ *Ibid.*, § 43.

⁴²⁷ Voorhoof, ‘Qualification of news portal as publisher of users’, *supra* note 421.

Section's approval of these systems can even be seen more broadly as a recommendation for online 'intermediaries' to start pre-moderating their services, or to ultimately block the opportunity for user comments altogether. Finally, in its statement, ARTICLE 19 notes that, although *Delfi* paid relatively little as non-pecuniary damages, this should not have born any difference in the Court's proportionality analysis. The imposing of non-pecuniary damages as such was a disproportionate interference with *Delfi*'s right to freedom of expression.⁴²⁸

Not surprisingly, *Delfi* filed a request for referral of the case to the Grand Chamber. A total of 69 entities including media organizations, Internet companies, human rights groups and academic institutions supported the request.⁴²⁹ The Panel of the Grand Chamber accepted the request and gave permission to a number of organizations to file amicus curiae briefs.⁴³⁰

Grand Chamber hearing

The Grand Chamber hearing of *Delfi AS v Estonia* took place on 9 July 2014. During the oral hearing, the representatives of *Delfi* argued, first of all, that the news forum and its comment platform are two distinct parts of the same entity: the first represents the freedom of expression of the news portal operator, whereas the second represents that of the users. They argued that in this connection the news portal operator simply enables users to express themselves and, therefore, plays an 'intermediary' role. The lack of 'editorial control' over user-generated content is then balanced with user monitoring through, for example, reporting buttons. According to *Delfi*'s representatives, this essentially means that the responsibility of the traditional publisher is postponed until the publisher is aware of the relevant content. The representatives argued that this approach has been confirmed in the previously

⁴²⁸ ARTICLE 19, 'European Court strikes serious blow', *supra* note 412.

⁴²⁹ See Index on Censorship, 'Index supports referral request in *Delfi v. Estonia*', Index, 14 January 2014 <<http://www.indexoncensorship.org/2014/01/index-supports-referral-request-delfi-v-estonia/>>, 4 January 2015. Grand Chamber of the Court consists of 17 judges. According to Article 43 ECHR, a party not satisfied with the Chamber judgment may request the referral to the Grand Chamber within three months of the judgment in question. A panel of five judges of the Grand Chamber decide whether the request will be accepted. The referral can be accepted if it raises 'a serious question affecting the interpretation or application' of the ECHR or 'a serious issue of general interest'. See more on Ovey & White, *The European Convention*, 5th Edition, *supra* note 3, at 22.

⁴³⁰ See, inter alia, the third party interventions by Bodnar, Adam, 'Delfi v. Estonia: Written Comments by the Helsinki Foundation for Human Rights', 3 April 2014, <http://www.obserwatorium.org/images/Delfi_opinia%20Wieka%20Izba.pdf>, 4 January 2015; and Jansen, Nani, 'Written Comments in the Case of *Delfi AS v. Estonia*', Media Legal Defence Initiative, et. al, 6 June 2014, <<http://mediadefence.org/sites/default/files/files/20140606%20Delfi%20intervention%20FINAL.pdf>>, 4 January 2015; and Simor, Jessica, 'Delfi v. Estonia: Submissions on behalf of European Digital Media Association, CCIA and EuroISPA', <http://www.cciainet.org/wp-content/uploads/2014/06/CCIA-EDiMA-EuroISPA-submission-on-Delfi-case_June-2014.pdf>, 3 January 2015.

mentioned Committee of Ministers 2003 Declaration and the EU E-Commerce Directive.⁴³¹ Accordingly, in their view, *Delfi* (as a news portal operator) should be regarded as an ‘intermediary’ or a ‘host provider’ rather than as a publisher or a ‘content provider’.

In response to this, the Government argued that *Delfi* is in fact asking the Court to re-establish facts and law previously established by the domestic courts. According to the Government, the Court does not have competence to adopt views that differ from those of the domestic courts, who have thoroughly evaluated this case. Regarding the domestic courts’ decision to establish *Delfi* as a publisher, the Government stressed that the comments had formed a part of *Delfi*’s journalistic work: *Delfi* selected the topic of the article, titled it, and then invited users to comment on it. Moreover, in 2006, the comments section could be found directly under the article, and comments could be posted without registration, read without leaving *Delfi*’s webpage, and amended or deleted only by *Delfi*. In addition, *Delfi* had issued ‘house rules’ which users were asked to respect. The Government argued that this excludes the applicability of the EU E-Commerce Directive in this case since, as mentioned previously, according to its Recital 42, the Directive only covers cases where activity of the operator is limited to ‘mere technical, passive and automatic nature’. The Government also referred to the case-law of the European Court of Justice (ECJ), where the ECJ has ruled that domestic courts are best placed to decide on the question of whether an operator is to be regarded as a ‘mere host’.⁴³² Accordingly, the law to be applied in this case was the Estonian civil law, which the domestic courts’ final ruling was rightly based on. However, it should be noted that the Judges of the Grand Chamber later asked questions from the Government regarding the foreseeability of the Estonian law in 2006 and today. This suggests that the Judges consider the possibility of finding a breach of the Convention rights due to lack of appropriate legislation.⁴³³

In addition to re-establishing its status as an intermediary, *Delfi* also invited the Grand Chamber to take a stand regarding the measures recommended by the First Section. For one, *Delfi* stated that it considers pre-monitoring as a disproportionate requirement. Furthermore,

⁴³¹ See oral pleading before the Grand Chamber by *Delfi*’s representative, European Court of Human Rights, ‘Oral pleading before the Grand Chamber in the case of *Delfi*’, <http://www.echr.coe.int/Pages/home.aspx?p=hearings&w=6456909_09072014&language=lang&c=&py=2014>, 3 January 2015. See also EU E-Commerce Directive, *supra* note 41; and Declaration on freedom of communication on the Internet, *supra* note 37.

⁴³² See *Google France and Google*, joined cases C-236/08 to C-238/08, 23 March 2010, § 119, and *L’Oreal SA and Others v. eBay International AG and Others*, C-324/09, 12 July 2011, § 117.

⁴³³ See with this regard, for example, the aforementioned case of *Pravoye Delo and Shtekel v. Ukraine*, *supra* note 293.

the representatives of *Delfi* stressed that adopting a real name policy through which users could be identified would be an infringement of users' rights per se.⁴³⁴ Adopting such a policy as a self-regulatory measure might be acceptable, but it would be utterly disproportionate for a State to order its use.⁴³⁵ The Government agreed with this argument and noted that the operators, rather than the Government, should decide whether or not users are required to identify themselves. However, the Government stressed that *Delfi* should have taken measures to prevent or moderate unlawful comments because it must have known that the article could provoke such comments. It was disproportionate and unfair to place responsibility for monitoring the Internet on the potential victim. Furthermore, the Government noted that in connection to civil cases such as the present one, the authorities are not permitted to use the special investigative measures necessary for identifying anonymous commentators. Therefore, in these situations, the affected person cannot bring a case against the author or authors of the comments. In the Government's view, this is not a failure attributable to the State. The Government fulfils its positive obligation to ensure the right to private life, following from Article 8 ECHR, by leaving it for the news portal owners to decide how to balance competing rights at stake; and by ensuring that if the owners fail, they can be held liable for any violations. Therefore, a private publishing house like *Delfi* could not expect to be free from liability when it had created a portal, where unidentified authors could post comments. In addition, the Government noted that *Delfi* has since taken steps to ensure better balance between Articles 8 and 10 ECHR, as required by the domestic courts. Therefore, the Government believes the domestic judgment in this case had not had any disproportionate implications on *Delfi*. Judges of the Grand Chamber also took particular interest in these measures adopted by *Delfi*, potentially suggesting that these might bare a role in their judgment.⁴³⁶

Finally, when asked about its view on the more general implications of the Court's ruling in this case, the Government stressed that the judgment will not affect, inter alia, social networking websites. The Government noted that both *Delfi* and the third parties had

⁴³⁴ The Council has underlined the importance of anonymity as a tool for the people to voice their opinion on subjects for which they might not be able to express under real names. See, inter alia, Declaration on freedom of communication on the Internet, *supra* note 37, § 7.

⁴³⁵ Oral pleading before the Grand Chamber by *Delfi*'s representative, European Court of Human Rights, 'Oral pleading before the Grand Chamber in the case of *Delfi*', *supra* note 431.

⁴³⁶ *Delfi* informed the Court that nowadays its comment platform is separated from the news portal and the commentators need to identify themselves prior to posting a comment. Moreover, *Delfi* currently employs five moderators, who moderate the inappropriate comments that have been reported by users; written to provocative articles; or spotted by the author of the relevant article.

suggested parallels between such websites, search engines, online auction websites, and *Delfi*. The Government, however, finds these parallels to be inappropriate, first of all, because on such websites users have control over their comments. In addition, the Government noted that on such websites users usually start new discussions, while on *Delfi*'s news portal this decision is always *Delfi*'s. Hence, in the Government's view, the First Section judgment should not be regarded as imposing 'strict liability' on all online operators. It is based on the facts of this case and the active role of the online operator. Websites like Facebook or Twitter, on the other hand, would likely be regarded as passive operators, in other words as 'intermediaries' or ISPs. *Delfi* disagreed with this statement, arguing that if the ruling was upheld it would apply to news portals containing a comments platform, YouTube hosting third party videos, Blogger, as well as individual blogs allowing third-party comments. In their concluding remarks, *Delfi*'s representatives stressed that the Court should follow the European consensus established in the ECJ case-law and several domestic judgments, and exclude service providers such as *Delfi* from liability.⁴³⁷ The case is still pending before the Grand Chamber.

Author's analysis

In the light of the aforementioned, it seems clear that the most central (and controversial) element regarding media's online liability for user-generated content is, in fact, the classifying of an entity as a 'media actor' (a 'content provider' or a publisher) in connection to such content. I first read the *Delfi* judgment in October 2013. Initially, I was strongly of the opinion that the First Section had erred in holding a news portal (*Delfi*) liable for the user-generated content. I agreed with the critics of the judgment, was pleased when the case was accepted to the Grand Chamber, and cheered for the applicant during the Grand Chamber hearing. However, during my research, I began to understand the Government's arguments and the First Section's argumentation. I still agree with Dirk Voorhoof, who noted

⁴³⁷ Oral pleading before the Grand Chamber by *Delfi*'s representative, European Court of Human Rights, 'Oral pleading before the Grand Chamber in the case of *Delfi*', *supra* note 431. See, inter alia, ECJ cases *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, C-70/10, 24 November 2011 and *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, C-360/10, 16 February 2012. In Germany the domestic courts held in a case regarding Google's BlogSpot services that Google is not liable to actively monitor the blogs published by its users and that it should take action only if there is a notice of infringement. See Hipp, Dietmar; Müller, Martin U.; and Rosenbach, Marcel, 'Online Defamation: Decision Brings More Complications than Clarity', *Spiegel Online International*, 4 November 2011, available at <<http://www.spiegel.de/international/zeitgeist/online-defamation-decision-brings-more-complications-than-clarity-a-795492.html>>, 4 January 2015. Furthermore, after the First Section judgment the Northern Ireland High Court expressly decided not to follow the Chamber judgment, High Court of Justice in Northern Ireland Queen's Bench Division, *J19 & Anor v. Facebook Ireland*, [2013] NIQB 113, 15 November 2013.

that classifying a news portal as a publisher rather than a passive ‘host’ to user-generated comments has far-reaching implications, and that to apply this interpretation as a general rule would be devastating from the perspective of online freedom of expression.⁴³⁸ However, when the circumstances of this specific case (in particular the actions of *Delfi* back in 2006) are examined closely – and this is the case-by-case analysis the Court conducts – the First Section ruling does not seem to suggest such an interpretation.

First of all, the Government is correct when it states that the Court has no authority to change the domestic courts’ interpretation of the national law if they have conducted a balanced analysis of the case. In this case, the domestic courts analysed the applicability of the EU E-Commerce Directive, but came to the conclusion that it was not applicable. I consider it to be proven that before this conclusion they had thoroughly analysed *Delfi*’s activities concerning its comment platform and taken the view that, at the time, *Delfi* was not a ‘mere host’ in the meaning of the EU E-Commerce Directive (or the Committee of Ministers Declaration on freedom of communication).⁴³⁹ The key element in this regard was that the authors lost all control of their comments as soon as they had been posted. *Delfi* was the only one able to modify the posted comments, and it used the ‘automatic filter’ and the ‘notice-and-takedown system’ to do this. Thus, *Delfi* had the sole power to decide which comments were published. In the light of all the aforementioned, I feel the domestic courts correctly concluded that *Delfi* had practiced ‘editorial control’ over its comment platform and was, therefore, to be regarded as a ‘content provider’ or a publisher of the comments. It was held liable because the measures it had adopted in order to comply with its responsibilities had, indisputably, failed to achieve their purpose.⁴⁴⁰ This ruling is in line with the principles adopted in the Court’s case-law regarding printed media cases.⁴⁴¹

Thus, in my view, this case does not set any general principles identifying all online news platforms as publishers of their comment sections.⁴⁴² It is just another ruling that must be analysed in the light of its specific circumstances. I hypothesize that the Grand Chamber will

⁴³⁸ Voorhoof, ‘Qualification of news portal as publisher of users’, *supra* note 421.

⁴³⁹ EU E-Commerce Directive, *supra* note 41; and Declaration on freedom of communication on the Internet, *supra* note 37. See analysis in Part II, Section 2.2 Standard-Setting Texts.

⁴⁴⁰ This ruling resembles a lot the one taken by the US court in the aforementioned case of *Stratton Oakmont v. Prodigy*, *supra* note 85, where the court concluded that by active utilization of technology and man power to delete wrongful messages, Prodigy had acquired editorial control of the published content. See with this regard Introduction, Section 2.2.2 Approach to liability for user misuse, Emergence of case-law.

⁴⁴¹ See with regard to classical media the cases of *Gündüz v. Turkey*, *supra* note 137; and *Süreş v. Turkey (No.1)*, *supra* note 142.

⁴⁴² In fact, noting the changes made in its business model, it is possible that also *Delfi* would not be regarded as a publisher nowadays.

come to the same conclusion as the First Section, provided that it does not let itself be influenced by the large amount of publicity surrounding this case.⁴⁴³ If this prediction came true, I hope the Grand Chamber is cautious in wording its judgment and binds it to the specific circumstances of this case to prevent attempts to apply it expansively. Furthermore, I hope the Grand Chamber notes the several standard-setting texts adopted by the Council, and emphasizes the possible problems inherent to the application of ‘reporting buttons’ and ‘automatic filtering systems’ endorsed by the First Section. When applied correctly, these measures can be useful, but attention must be paid to the risks they pose in the form of private censorship. I would also welcome a statement from the Court further encouraging Member States to co-operate with ISPs and other stakeholders in order to clarify liability issues and to further discussions on the adaption and applicability of different monitoring methods. Now it is left for me to assess how these principles can be applied with regard to ‘cyber hate’ cases.

⁴⁴³ This has happened before, for example, in the case of *Lautsi and Others v. Italy*, Application no. 30814/06, [GC] March 2011, where the Grand Chamber overturned the Chamber ruling after the case attracted similar kind of publicity and several interventions also by Member States. The other reservation I have to make regarding this hypothesis concerns the question posed by the Grand Chamber as to whether the law at the relevant time in Estonia was predictable enough for *Delfi* to foresee it would be held liable for its actions.

CONCLUDING REMARKS: WHO IS (NOT) LIABLE FOR CYBER HATE?

My focus throughout this research has been the liability for user-generated ‘cyber hate’. In Part I, I concluded that the Council has committed itself to the combat against ‘hate speech’. In Part II, I discovered that this commitment has also extended to ‘cyber hate’. Regarding liability, I found out that the actions of some online operators might justify the drawing of parallels between them and representatives of the classical media. Traditionally, the Court has held these representatives liable for disseminating third-party-content involving ‘hate speech’. However, the lack of ‘cyber hate’ cases forced me to rely on standard setting texts and principles established in connection to other cases involving the Internet. When analysing the defamation case *Delfi AS v. Estonia*, I came to the conclusion that under specific circumstances it is acceptable to define a news portal operator as a ‘content provider’ or a publisher of user-generated content it hosts, and, therefore, to impose liability on it.⁴⁴⁴ The key element to be analysed is the operator’s direct ‘editorial control’ of the content. This excludes the applicability of both the EU E-Commerce Directive and the Committee of Ministers 2003 Declaration, which apply only to ‘intermediary’ ISPs, and, with regard to ‘hate speech’ offences, of the Additional Protocol to the Cybercrime Convention.⁴⁴⁵

However, it is important to highlight a central element that differentiates the case of *Delfi* from ‘cyber hate’ cases. This is the fact that, according to the rules and principles adopted in the framework of the Council, Member States should have criminalized acts involving publication and dissemination of ‘cyber hate’. Moreover, as was established by the Court in the case of *K.U. v. Finland*, from the positive obligations inherent to Article 8 ECHR it follows that it is not enough for a Member State to criminalize certain actions, but it must also ‘reinforce the deterrent effect of criminalisation by applying criminal law provisions in practice through effective investigation and prosecution’.⁴⁴⁶ Accordingly, the anonymity of authors of ‘cyber hate’ – bloggers, private website owners, or even news portal commentators – does not prevent primary responsibility from being imposed on them. Nevertheless, I believe that wider imposing of liability is necessary for the fight against ‘hate speech’ to be effective. Accordingly, the possibility to impose liability on authors of impugned content should not exclude the additional liability being imposed on entities that facilitate its publication. It is at this stage that the principles adopted in the case of *Delfi* enter

⁴⁴⁴ *Delfi AS v. Estonia*, *supra* note 5.

⁴⁴⁵ Additional Protocol, *supra* note 313; EU E-Commerce Directive, *supra* note 41 ; and Declaration on freedom of communication on the Internet, *supra* note 37.

⁴⁴⁶ *K.U. v. Finland*, *supra* note 34, § 46.

the picture. As stated above, according to the Additional Protocol to the Convention on Cybercrime, imposing liability on a service provider acting as a ‘mere conduit’ requires evidence of the ISP’s criminal intent.⁴⁴⁷ However, as in the case of *Delfi*, also in ‘cyber hate’ cases it can be argued that an entity that has ‘editorial control’ over user-generated content is more than a ‘mere conduit’. The existence of such control has been enough to establish liability in classic ‘hate speech’ cases.⁴⁴⁸ Noting the importance granted to the fight against ‘cyber hate’ in the work of the Council and, provided that the First Section judgment in the case of *Delfi* is not overruled, I see no reason why this approach could not be applied to user-generated ‘cyber hate’ content.

Moreover, imposing liability on ‘content providers’ only when they exercise sufficient amount of ‘editorial control’, risks ‘content providers’ not practising such control altogether. Allowing such ‘wilful blindness’ would be detrimental to the fight against ‘cyber hate’. Accordingly, I endorse imposing a wider ‘duty of diligence’ on these entities. And I would go even further. In my opinion, this principle should also be applied to some extent to ISPs enjoying the ‘limited liability regime’ established in the Additional Protocol. Of course, as stated above, any liabilities imposed on these actors must be carefully delimited and balanced according to the functions of the specific entity. Furthermore, they must be in conformity with the established rules and principles. Therefore, for example, ISPs cannot be obligated to monitor conduct on their services. However, a discussion could be started with all the relevant private sector actors in order to agree on some voluntary measures from which both ‘content providers’ and ISPs could select the self-regulatory measures most suitable for them. As in the case of *Delfi*, liability would then only arise if the operator failed to prevent or respond to infringements that it reasonably could have addressed. In the aforementioned General Conclusions, ECRI recommends measures such as blocking websites entailing impugned content, adaption of filtering systems, and refusing anonymity.⁴⁴⁹ However, as has been noted in many of the Council’s standard-setting texts, in order for these monitoring measures to be adopted correctly (and to avoid the risk of undue self-censorship), further education of online operators is needed.⁴⁵⁰ Moreover, this co-

⁴⁴⁷ Explanatory Report to Additional Protocol to the Convention on Cybercrime, *supra* note 314, § 45.

⁴⁴⁸ See the aforementioned cases of *Sürek v. Turkey (No.1)*, *supra* note 142; and *Gündüz v. Turkey*, *supra* note 137, discussed in Part I, Section 3.4.2 Media’s liability for opinions of others.

⁴⁴⁹ General Conclusions, ‘Legal Instruments to Combat Racism on the Internet’, *supra* note 395, § 6.

⁴⁵⁰ With this regard, I am happy to note the amount of publicity gained by the Council’s Youth Department’s ‘No Hate Speech Movement: Campaign of Young People for Human Rights Online’ aiming at raising awareness of young people about ‘cyber hate’. See Youth Department of the Council of Europe, European

operation should not be limited to European entities. To tackle problems caused by the ‘American Safe Haven’, ECRI recommends starting an international discussion on measures to counter racist sites with all online operators.⁴⁵¹ I agree with this recommendation, and the positive effects of such co-operation can already be seen in the voluntary actions of Yahoo! in the aforementioned case concerning the sale of Nazi memorabilia.⁴⁵²

In the light of all aforementioned, I think I have found an answer to my question, and in the end it is quite simple. In my opinion, the correct answer is that all the actors taking actively part in the dissemination of ‘cyber hate’ should be liable for it. The key word is ‘actively’. In the diagram presented at the beginning of this research, this could mean all the specified entities depending on the amount of ‘editorial control’ they have over the information published or transmitted through their services. While the author of the impugned content should always be held liable (when the essential elements of an offense are met), the entity publishing this content is liable if it should have addressed it. Furthermore, an entity merely hosting or providing access to the content avoids liability if it has complied with its respective ‘duty of diligence’. Naturally, in order to adopt this approach, the responsibilities of respective online operators should be outlined with more precision. However, this is outside the scope of this research. In sum, the finding of my analysis is simply that in order for the fight against ‘hate speech’ to be effective, online operators should not be allowed to turn a blind eye to ‘cyber hate’ blooming on their services. Nonetheless, any actions taken with this regard must respect the inherent principles of Article 10 of the Convention.

Youth Centre, ‘No Hate Speech Movement: Campaign of Young People for Human Rights Online’, campaign website, available at <<http://www.nohatespeechmovement.org/campaign>>, 11 January 2015.

⁴⁵¹ General Conclusions, ‘Legal Instruments to Combat Racism on the Internet’, *supra* note 395, § 6.

⁴⁵² See on this Part II, Section 1.2 Additional Challenge: American safe haven.